

R E P O R T S
OF
C A S E S

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

**With Tables of the Names of the Cases and Principal
Matters.**

By EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

*Si quid novisti rectius istis,
Candidus imperti ; si non, his utere mecum.* **HOR.**

V O L. VIII.

**Containing the Cases of MICHAELMAS, HILARY, EASTER, and
TRINITY Terms, in the 47th Year of GEO. III. 1806—1807.**

L O N D O N :

**PRINTED FOR JOSEPH BUTTERWORTH AND SON, LAW-
BOOKSELLERS, 43, FLEET-STREET; AND J. COOKE;
ORMOND QUAY, DUBLIN.**

1814.

JUDGES
OF THE
COURT OF KING's BENCH,

During the Period of these REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.

Sir NASH GROSE, Knt.

Sir SOULDEN LAWRENCE, Knt.

Sir SIMON LE BLANC, Knt.

ATTORNIES-GENERAL.

Sir ARTHUR PIGGOTT, Knt.

Sir VICARY GIBBS, Knt.

SOLICITORS-GENERAL.

Sir SAMUEL ROMILLY, Knt.

Sir THOMAS PLUMER, Knt.

A

T A B L E

OF THE

CASES REPORTED

IN THIS EIGHTH VOLUME.

N. B. Those Cases which are printed in *Italics* were cited from MS. Notes.

A	Page	Page
A LLEN v. Ormond	4	Bruce, Ex parte 27
Appleby v. Dods	300	Buller, Rex v. 389
Askew, Clarke v.	28	Burrough, Doe d. v. Reade 353
Axmouthe, Inhabitants of Rex v.	383	Byron, Lord, Keene d. v. Deardon 248. 298
B		C
Bailey, Pitcher v.	171	<i>Cambridge, Knight v.</i> 135
Baring v. Day	57	Canterbury, Archbishop of Rex v. 213
Bartrum, Rex v.	269	Carlisle, Mayor, &c. of, v. Balmire, 487
<i>Bates, Jenkins v.</i>	414	————— <i>Rex v.</i> 544, 5.
Battye v. Gresley	319	Carlisle, Doe d. Earl of, v. Woodman 228
Bedworth, Inhabitants of, Rex v.	387	Castle Careinion, Inhabitants of, Rex v. 75
Bell v. Saunderson	55	Cathrow v. Hagger 106
<i>Berkeley, Morris v.</i>	172	Chatham, Inhabitants of, Rex v. 498
<i>Berwick v. Parkin</i>	527	Clarke v. Askew 28
Birch v. Trist	412	Clarke, Doe d. Lockwood v. 185
Balmire, Mayor, &c. of Carlisle v.	487	Clayton, Doe v. 141
Boot v. Wilson	311	Clipson, Shadgett v. 328
Braddick v. Thompson	344	Cobb v. Stokes 358
Brander, Young v.	10	Cole, Kerrison v. 231
Bridges, Rex v.	53	
Brockwell, Winter v.	308	
Brown, Rex v.	528	
<i>Brown, Stamma v.</i>	136	
Browne, Doe d. Warner v.	165	

	Page		Page
Cook, Gray v.	336	Goodright v. Forrester	552
— v. Hundredors of Pimhill	173	— v. Vivian	190
Cox, Hodinnott v.	268	Goodtitle, d. Wright, v. Otway	357
Cromford Inhabitants of, Rex v.	25	Gordon v. Secretan	543
D		Gould v. Robson	576
Daniel v. Dod	334	Gray v. Cook	336
Davies, Phillips v.	178	Greathed, Doe v.	91
Davis Swift d. Farr v.	354	Gresley, Battye v.	319
Day, Baring v.	57	II.	
— , Dunster v.	239	Hagger, Cathrow, v.	106
Deardon, Keene d. Lord Byron v.	248	Harden v. Smith	16
	298	Harding, Howell v.	362
Dell v. Wild	240	Harris, Doe d. v. Greathed	91
Deron, Earl of, Rex v.	111	Hatfield, Inhabitants of, Rex v.	6
Dod, Daniel v.	334	Hawkes v. Hawkey	427
Dods, Appleby v.	300	Hawkey, Hawkes v.	<i>ibid.</i>
Doe d. Warner v. Browne	165	Hayton v. Jackson	511
— d. Lockwood v. Clarke	185	Headley, Williams v.	378
— v. Clayton	141	Hill v. Patten	373
— v. Greathed	91	Hodgson, Johnson v.	38
— d. Burrough v. Reade	353	Hodinott v. Cox	268
— d. Carlisle, Earl of, v. Woodman	228	Holmes v. Ramier	502
Dunster v. Day	239	Horn v. Hughes	347
E		Horsley, Inhabitants of, Rex v.	405
Earle v. Rowcroft	126	Howell v. Harding	362
Edmondson v. Edmondson	294	Hughes, Horn v.	347
Elden v. Keddel	187	Hume v. Peploe	168
Elgin, Voght v.	372	Hundredors of Pimhill, Cooke v.	173
Elnon, Irvin v.	54	I, J	
Erith, Inhabitants of, Rex v.	539	Jackson, Hayton v.	511
Eyles v. Faikney	172	Jenkins v. Bates	414
F		Jervoise, Synge v.	466
Faikney, Eyles v.	172	Inglis, Kensington v.	273
Farr, Swift d. v. Davis	354	Ingram v. Milnes	445
Fisher v. Mowbray	330	Johnson v. Hodgson	38
Forrester, Goodright v.	552	Jones, Rex v.	31. 451
Furbor, Warrington v.	242	Irvin v. Elnon	54
G		K	
Gale v. Reed	78	Keddel, Elden v.	187
George v. Lousley	13	Keene, d. Ld. Byron, v. Deardon,	248
Gibson, Mathews v.	527		298
— Rex v.	107	Kensington v. Inglis	273
		Kerrison v. Cole	231
		Kingston, Rex v.	41

TABLE OF THE CASES REPORTED.

vii

	Page		Page
Kirkby Ravensworth Hospital	221	Pimhill, the Hundredors of	173
<i>Knight v. Cambridge</i>	135	<i>Pitcher v. Bailey</i>	171
L		<i>Potter v. Marsden</i>	525
Lockwood, Doe d. v. Clarke	185	<i>Prentice, Seare v.</i>	348
Lousley, George v.	13	R	
Lowe, Ex parte	237	Radnor, Earl of, <i>Lowther v.</i>	113
Lowther v. Earl of Radnor	113	<i>Rainier, Holmes v.</i>	502
Luffe, Rex v.	193	<i>Reade, Doe d. Burrough v.</i>	353
M		<i>Reed, Gale v.</i>	78
Maddock v. Rumball	304	<i>Rex v. Axmouth, Inhabit. of,</i>	383
Margaret, St., Leicester, Inhabitants		<i>v. Bartrum</i>	269
of, Rex v.	332	<i>v. Bedworth, Inhabit. of,</i>	387
<i>Marlowe, Wadham v.</i>	314	<i>v. Bridges</i>	53
Marsden, Potter v.	525	<i>v. Brown</i>	528
Martindale, Sparkes v.	593	<i>v. Buller</i>	389
Massey, Moseley v.	148	<i>v. Canterbury Abp. of,</i>	213
Mathews v. Gibson	527	<i>v. Carlisle, Mayor, &c. of,</i>	544,
Mayor of Carlisle v. Balmire	487		5
Middlesex, Sheriff of Rex v.	525	<i>v. Castell Careinion, Inhabitants</i>	
Miles v. Sheward	7	<i>of,</i>	75
Milnes, Ingram v.	445	<i>v. Chatham, Inhabit. of,</i>	498
Monkhouse, Roberts v.	547	<i>v. Collison</i>	457
Moore, West v.	339	<i>v. Cromford, Inhabit. of,</i>	25
<i>Morris v. Berkley</i>	172	<i>v. Devon, Earl of,</i>	111
Moseley v. Massey	148	<i>v. Erith, Inhabitants of,</i>	539
Mowbray, Fisher v.	330	<i>v. Gibson</i>	107
N		<i>v. Hatfield, Inhabitants of,</i>	6
Nash, Welsh v.	394	<i>v. Haiseley, Inhabit. of</i>	405
Newell, Omealy v.	364	<i>v. Howard</i>	458
O		<i>v. Jones</i>	31. 451
Omealy v. Newell	364	<i>v. Kingston</i>	41
Ormond, Allen v.	4	<i>v. Liverpool Inhabit. of,</i>	455
Otway, Goodtitle d. Wright v.	357	<i>v. Luffe</i>	193
P		<i>v. Middlesex, Sheriff of,</i>	525
Palmer, Rex v.	416	<i>v. Palmer</i>	416
<i>Parkin, Berwick v.</i>	527	<i>v. St. Margaret's Leicester,</i>	
Patten, Hill v.	373	<i>Inhabitants of,</i>	332
Peploe, Hume v.	168	<i>v. Seale</i>	568
Peters, Goodright d. v. Vivian	190	<i>v. Sherborne, Inhabit. of,</i>	537
Phillips v. Davis	178	<i>v. Swift</i>	584
——, Shakespear v.	433	<i>v. Theodorick</i>	543
——, Warburton v.	527	<i>v. Thetford, Mayor of,</i>	270
		<i>v. Tomkins</i>	180
		<i>v. Vickerman</i>	272

Rickman

TABLE OF THE CASES REPORTED.

	<i>Page</i>	<i>T</i>	<i>Page</i>
Rickman v. Strudwick	105	Taylor v. The Royal Exchange Assu-	
Roberts v. Monkhouse	547	rance Company	393
Robson, Gould v.	576	Theodorick, Rex v.	543
Rowcroft, Earl v.	126	Thetford, Mayor of, Rex v.	270
Royal Exchange Assurance Company,		Thompson, Braddick v.	344
Taylor v.	393	Todd, Welsford v.	580
Rumball, Maddock v.	304	Tomkins, Rex v.	180
		Trist, Birch v.	412
S		V	
Saint Margaret's, Leicester, Inhabi-		Vicars v. Wilcocks	
tants of Rex v.	332	Vickerman, Rex. v.	272
Saunderson, Bell v.	55	Vivian, Goodright d. Peters v.	190
Scholey, Scott v.	467	Voght v. Elgin	372
Schroeder v. Smith	16	W	
Scott v. Scholey	467	Wadham v. Marlowe	314
Seale, Rex v.	568	Warburton, Phillips v.	527
Sear v. Prentice	348	Warner, Doe d. v. Browne	165
Secretan, Gordon v.	548	Warrington v. Furbor	242
Shadgett v. Clipson	328	Welsford v. Todd	580
Shakespear v. Phillips	433	Welsh v. Nash	394
Sherborne, Inhabit. of, Rex v.	537	West v. Moore	339
Sheriff of Middlesex, Rex v.	525	Wilcocks, Vicars v.	1
Sheward, Miles v.	7	Wild, Dell v.	240
Smith, Harden v.	16	Williams v. Headley	378
Smith, Schroeder v.	<i>ibid.</i>	Wilson, Boot v.	311
Smith v. Wilson	437	Wilson, Smith v.	437
Sparkes v. Martindale	593	Winter v. Brockwell	308
Stamma v. Brown	136	Woodman, Doe d. Earle of Carlisle v.	228
Stokes, Cobb v.	358	Wright, Goodtitle d. v. Otway	357
Strudwick, Rickman v.	105	Y	
Swift, d. Farr, v. Davis	354	Young v. Brander	10
Swift, Rex v.	584		
Synge v. Jervoise	466		

C A S E S

ARGUED AND DETERMINED

1806.

IN THE

Court of KING'S BENCH,

IN

Michaelmas Term,

In the Forty-seventh Year of the Reign of GEORGE III.

Thursday,
Nov. 6th.

VICARS *against* WILCOCKS.

IN an action on the case for slander the plaintiff declared, that whereas he was retained and employed by one *J. O.* as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to be believed by *J. O.* and others that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of *J. O.* and to cause him to be dismissed therefrom, and to impoverish him; in a discourse with one *J. M.* concerning the plaintiff and concerning certain flocking cord of the defendant alleged to have been before then cut, said that he (the defendant) had last night some flocking cord cut into six yard lengths, but he knew who did it; for it was *William* Vicars*; meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse with other third persons, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard. By reason whereof the said *J. O.* believing the plaintiff to have been guilty of unlawfully cutting the said flocking cord, &c. discharged him from his service and employment, and has always since refused to employ him; and also one *R. P.* to

Where special damage is necessary to sustain an action for slander; it is not sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander.

VOL. VIII.

B

whom

*[2]

1806.

VICARS
against
WILCOCKS.

whom the plaintiff applied to be employed after his discharge from *J. O.*, on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises the plaintiff has been and still is out of employ and damnified, &c.

It appeared at the trial before *Lawrence J.* at *Stafford* that the plaintiff had been retained by *J. O.* as a journeyman for a year at certain wages, and that before the expiration of the year his master had discharged him in consequence of the words spoken by the defendant. That the plaintiff afterwards applied to *R. P.* for employment, who refused to employ him, in consequence of the words, *and because his former master had discharged him for the offence imputed to him.* The plaintiff was thereupon nonsuited; it being admitted that the words in themselves were not actionable without special damage; and the learned Judge being of opinion that the plaintiff having been retained by his master under a contract for a certain time then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff: that the supposed special damage was the loss of those advantages which the plaintiff was entitled to under his contract with his master; which he could not in law be considered as having lost, as he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service. 2dly, With respect to the subsequent refusal of *R. P.* to employ the plaintiff, that it did not appear to be merely on account of the words spoken; but rather on account of his former master having discharged him in consequence of the accusation; without which he might not have regarded the words.

[3]

Jervis now moved to set aside the nonsuit, and urged that it was always deemed sufficient proof of special damage in these cases to shew that the injury arose in fact from the slander of the defendant, and it was not less consequence of it because the act so induced was wrongful on the part of the master. He said, that he could find no case where such a distinction was laid down, and that the practice of *Nisi Prius* was understood to be otherwise. 2dly, That the refusal of *R. P.* to employ the plaintiff was clear of that objection; and that such refusal had proceeded

proceeded upon the *alleged* cause of discharge by the first master, and not upon the bare act itself of discharge.

Lord ELLENBOROUGH C. J. said, that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence: a mere wrongful act of the master; for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seised the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression. And his Lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, non liquet that the refusal by *R. P.* to employ the plaintiff was in consequence of the words spoken, as it is alleged to be: there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ; which was more likely to weigh with *R. P.* than the mere words themselves of the defendant.

The other Judges concurring,

Rule refused.

1806.

VICARS
against
WILCOCKS.

[4]

ALLEN *against* ORMOND.

Friday,
Nov. 7th.

IN case for obstructing the plaintiff's *private* right of way, the declaration stated that the plaintiff was seised of two gardens with the appurtenances in *W.*, and claimed for him a right of foot and horseway "from his said gardens, &c. unto, into, over, across, and along a close called *Cranells* in the said parish, unto and into a certain public king's *highway* in the parish aforesaid, and so back again," &c. It appeared at the trial before *Chambre J.* at *Wells*, that the entire close called *Cranells* had previous to the year 1792 belonging to one *Spackman*, who then conveyed most of it to *Chantry* and *Hayes*, for the latter of whom the

One who has a grant of an occupation way may declare in case against the owner of the land over which the way leads for obstructing it, although it be proved that the pub-

lic in general had used the way without denial for the last 12 years. The terminus ad quem being laid to be a *public highway* is proved by evidence of a *public footway*, though such description of the terminus might have been bad on special demurrer, as not being sufficiently certain.

CASES IN MICHAELMAS TERM

1806.

ALLEN
against
ORMOND.
*[5]

plaintiff was trustee, for the purpose of building and laying out gardens; reserving by the same deed a foot and horse road, set out in a map annexed to * the deed, all round the extremity of the close; which road led as well over the parcel conveyed as over the part retained by *Spackman*. The two gardens mentioned in the declaration, together with a house belonging to *Hayes*, were taken out of the parcel so conveyed, and adjoined the road, which after passing by the gardens and over the part originally retained by *Spackman*, (on which latter the obstruction complained of was erected,) led immediately to a public *footway* approaching the city of *Bath*, and, by a circuitry, to a carriage road to the same place. It also appeared in evidence, that the foot and bridle road reserved to the purchasers in the conveyance from *Spackman* had for the last twelve years and upwards been constantly used by the public. The defendant was now in possession, through mesue conveyances, of the remainder of *Cramels*, which had been originally retained by *Spackman*, and had obstructed that part of the road granted which led over his own premises.

It was objected at the trial, amongst other things, 1st, that the general user of the road for so long a time by all the king's subjects having made it a common highway, the plaintiff's private right was merged in the public right; and that however he might still maintain an action of covenant against the grantor or those claiming under him, as upon a covenant running with the land, for obstructing him in the exercise of the private right of way granted to him; yet that in this form of action, where the plaintiff sues only as one of the king's subjects against a stranger, he could not complain of the nuisance, without shewing special damage. 2dly, That the terminus ad quem described in the pleadings being a public *highway*, which is nomen generalissimum, and must be taken to be a highway for all purposes, was not proved by evidence of a common *footway* only. These and other objections being overruled at the trial, and a verdict with nominal damages taken for the plaintiff, were now again urged by *East* and *Gaselee* upon a motion for a new trial. But

The Court said, with respect to the first objection, that where a party has a certain special right of way granted to him, he may rest upon that title, and need not resort to a general right, which may possibly be disputed by conflicting evidence; especially in

a case

[6]

a case like the present, of a public right of way growing out of an occupation way. As to the second point, they held the terminus ad quem laid to be well enough proved by evidence of a public footway; for it was a public *highway* for *foot passengers*; though such a description might be bad upon special demurrer, as not pointing out with sufficient certainty what sort of highway was meant. (a)

1806.
—
ALLEN
against
ORMOND.

Rule refused.

(a) Vid. *Rex v. The Inhabitants of Hatfield in Derbyshire*, M. 10 G. 2. B. R. Rep. Temp. Hardw. 315. Mr. Ford (MS.) reports the case thus: Indictment against the defendants for not repairing a highway, described the way to be a certain common and ancient King's highway for all the King's subjects; and it alleged to be so ruinous that the King's subjects cannot pass. And now, after a verdict for the King at Derby assizes, *Dennison* in arrest of judgment moved, that as there were various sorts of highways, as horseways, footways, and drift ways, and the common form of indictments is to express the nature of the way; therefore, this was ill. Sed *per curiam*, the bounds of the way, as to the length and breadth, are properly described; and as this is laid to be a highway for all the King's subjects, we must take it to be a way for all sorts of passengers and carriages; and to say it is a highway for all the King's subjects is a sufficient description of such a way. So judgment for the King.

But in *Alban v. Brounsall*, Yelv 163. upon demurrer to a plea of a right of passage, the bar was adjudged ill, amongst other reasons, for this, that it was not shewn what manner of passage it was, whether on foot, or horse, or cartway; so that it was in the whole uncertain.

MILES against SHEWARD.

[7]
Monday,
Nov. 10th.

IN case, upon a warranty of a horse, the third count stated, that whereas the plaintiff had bought of the defendant, upon warranty of soundness, a certain horse for 80*l.* paid by the defendant, and also all such parts of the promise itself, the breach of which is complained of, it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken. As where the plaintiff declared that in consideration of his re-delivery to the defendant of an unsound horse which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, &c. which should be worth 80*l.* and be a young horse, and then alleged a breach in both these respects, held sufficient; though the proof was not only of a promise that the second horse should be worth 80*l.* (which it was not) and be a young horse, but also of a warranty that it was sound, and had never been in harness.

1806:

—
MILES
against
SHEWARD.

plaintiff to the defendant, but which horse was unsound, and was in consequence returned by the plaintiff to and accepted by the defendant; and thereupon the defendant, in consideration of the premises, promised the plaintiff that he would sell and deliver to him *another horse*, in lieu of the horse so returned for unsoundness, *which should be worth 80*l.* and should be a young horse*; the plaintiff averred that the defendant did sell and deliver to him another horse in lieu of the horse so returned, but that the defendant deceived and defrauded the plaintiff in this, that the last-mentioned horse so delivered in lieu of the horse so returned, &c. at the time of the promise, &c. was not nor at any time since has been worth 80*l.*, but only 35*l.*: and the plaintiff further averred that the last-mentioned horse, &c. was not a young but an aged horse. The proof at the trial, at the sittings at *Westminster*, was that when the defendant agreed to take back the first horse for unsoundness, and to deliver another in lieu of it, he told the plaintiff that the latter “was worth 80*l.* that he would warrant it sound, and that it was a young horse, and had never been in harness.” The horse, though young, was proved not to be worth 80*l.* It was objected that the evidence did not sustain the count; the plaintiff having omitted to state two branches of the warranty in the contract declared on; namely, the *soundness* of the second horse, and that *it had never been in harness*. But Lord *Ellenborough* considered it to be sufficient that the plaintiff had set out all the substantive and material parts of the contract, the breach of which he complained of; the parts omitted not qualifying in any manner the sense of those parts set out upon which the breaches were assigned. The plaintiff therefore recovered a verdict; which

[8]

Park now moved to set aside, and to enter a nonsuit, by leave; contending that any variation, however trivial in setting forth a contract declared on, was fatal. *Per Buller J.* in *King v. Pippet* (a), and in *Drewry v. Twiss* (b). And he also referred to *White v. Wilson* (c), and to *Penny v. Porter* (d) which were decided on the same ground.

LORD ELLENBOROUGH C. J. If any one substantive part of the warranty stated, not qualified by another part omitted, be proved not to be true, is not that a breach of the warranty suffi-

(a) 1 *Term Rep.* 240.(b) 4 *Term Rep.* 560.(c) 2 *Bos. & Pul* 116.(d) 2 *East*, 2.

cient to maintain an action, although there may be also other parts of the warranty broken, which the plaintiff may not think it worth his while to complain of? The doctrine contended for would go the length of saying that in covenant, which is a contract under seal, all the covenants, though no breach of most of them be complained of, must nevertheless be set out, as forming one entire contract. The substantial part of the contract, of the breach of which the plaintiff complained, was, that the horse was not worth 80*l.*: this he proved: and whether or not it were sound, or had or had not even been in harness, was quite immaterial to this purpose. In *Penny v. Porter*, the alternative part of the contract, omitted to be stated, altered the whole nature of the contract; and the mode of executing it could not change the original contract itself.

GROSE J. concurred.

LAWRENCE J. It is a very different thing whether the plaintiff state truly those parts of a contract, the breach of which he complains of, though other parts not material to the question be not stated; or whether he state any part of it untruly; for then it appears to be a different contract. That was the case of *Bristow v. Wright (a)*. There, in an action against the sheriff for taking the goods of a tenant in execution, without satisfying the landlord for a year's rent then due, of which the sheriff had notice, the declaration in setting out the demise stated that the rent was reserved *quarterly*; which was not proved: and though it was unnecessary to state how the rent was reserved, if a year's rent were alleged to be due; yet the plaintiff having undertaken to state it, and stating it falsely, the variance was deemed fatal. So in *White v. Wilson*, the plaintiff declared upon a contract for wages upon a certain voyage from *London to Africa*, and from thence to the *West Indies*; but the proof was of a contract for a voyage from *London to Africa*, and from thence to the *West Indies or America, and afterwards to London, &c.*; which was a contract for a different voyage than that declared on.

LE BLANC J. Where the plaintiff states the consideration for the promise of the defendant, he must state the whole consideration; for otherwise the contract is not truly stated. But

(a) See *Williamson v. Allison*, 2 *East*, 450-2. where this case is commented upon.

1806.
—
MILES
against
SHEWARD,

[9]

[10]

1806.
 ———
 MILES
 against
 SHEWARD.

where he states *the consideration* truly, as, here, the re-delivery to the defendant of the first horse; and then states those parts of the defendant's promise, the breach of which he complains of, and states those truly; that is sufficient, without stating other parts of the promise irrelevant to the breach complained of.

Rule refused.

Tuesday,
 Nov. 11th.

YOUNG and Another *against* ALEXANDER BRANDER
 and DUNBAR.

Where the legal title to a ship remained for a month after the sale in the vendors, upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorized to make registry, &c. pursuant to the stat. 34 G. 3. c. 68. s. 15. yet the vendors are not liable during that interval for repairs ordered by the captain, under the direction of the vendee, (who for this purpose must be considered as a stranger to the legal owners,) and consequently had no authority express or implied to bind them.

IN assumpsit for work and labour done, and materials provided by the plaintiffs at the request of the defendants, tried before Lord *Ellenborough* C. J. at the sittings after *Michaelmas* term 1805, the plaintiffs had a verdict for 68*l.* 0*s.* 10*d.* subject to the opinion of the Court on the following case,

The plaintiffs are ship-builders. On the 10th of *June* 1803, the defendants became owners of the schooner *Rebecca*; and on the 26th of *May*, 1804, they, by a bill of sale duly executed on that day, and reciting the certificate of registry, transferred the whole of their interest in the *Rebecca* for a valuable consideration to one *Thomas Brander*: and on the same day an indorsement was duly made and attested on the original certificate of registry, according to the form prescribed by the stat. 34 G. 3. c. 68. and delivered, together with the bill of sale, to the purchaser, *Thomas Brander*; who on the same day took possession of the *Rebecca*, and from that time acted as sole owner: but he did not deliver a copy of the said indorsement to the persons authorized to make * registry, and grant certificates of registry, until the 23d of *June*, 1804, on which day he obtained a new certificate of registry. The defendants' names remained on the registry at the Custom-house, as owners, (but it did not appear to be with their concurrence) until the 23d of *June*, 1804, when such new registry was made. On the 11th of *June*, 1804, the captain of the *Rebecca*

*[11]

by

by order of *Thomas Brander*, took the *Rebecca* to the plaintiffs to be repaired for her outward voyage; who thereupon made the repairs, &c. which are the subject of this action, between the 11th and 19th of *June*, 1804; during which time the names of the defendants remained on the register at the custom-house: and no notice was given by the defendants to the plaintiffs of the change in the ownership previously to the work, being done. If the plaintiffs were entitled to recover in this action, the verdict was to stand; otherwise a nonsuit was to be entered.

1806.

—
YOUNG
against
BRANDER.

Yates, for the plaintiff, contended that as the defendants continued the legal owners of the ship till after the time when the repairs were made, by reason of the requisites of the registry acts not having been complied with, and without which no property in the ship could pass from them to the vendee, they were consequently liable, as owners, for repairs ordered by the captain. It has been long settled that the legal owners are liable for necessary repairs, whatever contract they may have entered into with the captain, unknown to the builder, that he should bear the burthen. *Rich v. Coe (a)*, *Garnam v. Bennett (b)*, and other cases, particularly *Westerdell v. Dule (c)*. The question arose in the latter upon an ineffectual attempt to convey under the registry acts. Now here the stat. 34 Geo. 3. c. 68. s. 15. expressly requires that a copy of the indorsement of the transfer of property shall be delivered to the person authorized to make registry and grant certificates of registry, otherwise such sale or contract, &c. shall be utterly null and void to all intents and purposes whatsoever. He was proceeding to argue the point of ownership on the statute (*d*) when *Le Blane J.* said that he supposed it would not be disputed on the other side that the requisites of the act had not been complied with at the time, and that the legal ownership still remained with the defendants, though they might have done every thing which they were to do in order to convey it to *Thomas Brander*: but still the question would be, whether they were chargeable with repairs ordered on account of another.

[12]

Lord ELLENBOROUGH C. J. then said, that the case was too clear to require argument. It is true that the requisites of the

(a) *Cowp.* 636.(b) 2 *Stra.* 816.(c) 7 *Term Rep* 306.

(d) *Vid. Moss v. Charnock*, 2 *East*, 399. *Heath v. Hubbard*, 4 *East*, 110. *Bloxam v. Hubbard*, 5 *East*, 407. and *Moss v. Mills*, 6 *East*, 144.

1806.

—
YOUNG
against
BRANDER.

*[13]

act have not been complied with ; and it is true that the owners of a ship are liable for repairs ordered *for them* or for *their benefit by their master* : but it was never heard of that, if a stranger ordered repairs for another's ship or carriage, the owner was liable for such repairs. Suppose a pirate ran away with a ship, would the owner be liable for repairs ordered by him ? Now here the captain by the order of *Thomas Brander*, the purchaser, who was a mere stranger to these defendants in point of law, directed the plaintiff to make the repairs : how then can the defendants, merely because they remained as owners upon the register, be liable for repairs ordered by the captain under the authority of a stranger to the defendants ? This is very different from the case of *Westerdell v. Dale* : that was a case of partnership, and there was no plea in abatement : *Wharton*, who was the same as *Dale*, had ordered the repairs ; and the case turned on the privity between those two. But here *Thomas Brander* ordered the repairs in his own right, and there was no privity of interest between him and the defendants. In that case the defendant's liability was pursuant to the credit actually given ; here it would be contrary to the credit actually given to hold the defendants liable.

Per Curiam,

Postea to the defendants.

Scarlett was to have argued for the defendants.

Tuesday,
Nov. 11th.

GEORGE *against* LOUSLEY.

Where an
award is
made after
the time ori-
ginally given
to the arbi-
trators, but
authority

was also given to them to enlarge the time ; an award within the enlarged time authorized is good upon the face of it, though it did not recite that the arbitrators did in fact enlarge the time : But the Court will not grant an attachment for the non performance of the award without the verification of the fact. Where the costs of the cause, and of the special jury, are distinctly and separately submitted to the discretion of arbitrators, they must distinctly adjudicate upon each ; otherwise the award is bad ; (but the plaintiff in this instance agreed to abandon it for so much.) The award was also set aside for so much as the arbitrators, without authority, had directed to be paid for their own expences.

it

it appeared to have been made after the time originally limited for making it; and it was not stated on the face of the award that the arbitrators had enlarged the time, within which it was made. But this, he contended, was not necessary: for as where a power of appointment is given, it is sufficient for the party authorized to make the appointment, without stating the power, but the law will refer the execution of it to the power itself; so the arbitrators need not set out their authority; but it is enough, that having authority to enlarge the time, they did in fact make an award within the time to which their authority might extend: and no presumption will be made against that which is to be collected from the fact itself of making their award.

The Court were disposed to think that this was a sufficient answer to the objection, as arising upon the face of the award; and called on the other side to sustain their rule for setting it aside.

Another objection however was made to the award, namely, that “the costs of the cause, *and of the special jury*,” as contradistinguished, were specifically left to the discretion of the arbitrators, and that the arbitrators had taken no notice of the latter in their award, which they were bound to do, it being specifically submitted to them (*a*); the amount of which was 15 guineas (though it was stated, that in fact the arbitrators had included that expence in their general estimate of the costs of the cause.) And further, that they had charged 96*l.* in the award for their own expences, for which they had no authority. As to the first of these, *Taunton* answered, that the arbitrators having a *discretion* given them as to the costs of the special jury, their silence on the subject could not be objected to by the defendant on the face of the award. 2dly, That the expences of the arbitrators were very reasonable under the circumstances of the case, and such as they were entitled to recover. But that at any rate the award would only be void for the excess of the 96*l.* and the 15 guineas for the special jury, which the plaintiff would give up; and it would be good for the rest.

Sir *P. Gibbs* and *Manley* contra, said, that as their affidavits did not go so far as to allege that the time was not enlarged in point of fact, they could not contend that the award was bad upon the face of it, because it did not recite such enlargement

1806.

GEORGE
against
LOUSLEY.
[14]

[15]

(a) Vid. *Randall v. Randall*, 7 *East*, 81.

1806.
—
GEORGE
against
LOUSLEY.

of the time upon the face of it : but, on the other hand, as the affidavits in support of the award did not alledge that the arbitrators had in fact enlarged the time before they made their award, the plaintiff was not entitled to make his rule absolute for an attachment.

Accordingly, the rule for setting aside the award (except for the excess of 96*l.*, the expences of the arbitrators, and of 15 guineas for the expence of the special jury) was discharged ; as was also the rule for an attachment.

Wednesday,
Nov. 12th.
[16]

The st. 39.
Geo. 3. c. 69.
s. 137. gives
to the West
India Dock
Company
certain rates
and duties
for all goods
imported
from the
West Indies
which shall
be landed,
&c. from on
board any
ship entering
into and
using the
docks ; which
rates are
directed to
be " accep-

HARDEN *against* SMITH.
SCHROEDER *against* The same.

THESE were actions for money had and received, money paid, &c. which were brought against the defendant, as Treasurer of the West-India Dock Company, to recover back certain sums, which had been paid by the plaintiffs (the purchasers of certain hogsheads of sugar before then imported from the West-Indies into the port of London, and which had continued all the time in the company's warehouses, and for which all the importation rates and duties had been satisfied,) to the officers of the company for the wharfage, and shipping into lighters, sent into the docks by the plaintiffs for that purpose, the same hogsheads of sugar, part for home consumption, part for exportation. The company on the one hand contending, that they were only bound, in consideration of the rates and duties received upon importation of the goods, to deliver the same free of further charge from their warehouses into inland

ted for the use of the docks and the quays, wharfs, and cranes and other machines belonging thereto, and the land-waiters fees on account of such goods after being unshipped, and all charges and expences of wharfage, landing, housing, and weighing such goods, and of such cooperage as the same may want after being unshipped, and all rent for warehouse room for twelve weeks, *and all charges of delivering the same from the said warehouses.*" The latter words include a delivery of the goods into lighters in the dock as well as an immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses ; although for the purpose of such delivery into lighters it be necessary to put the goods upon trucks in order to carry them across the quay, and afterwards crane them into the lighters. But it seems that if the owner require any work to be done upon the goods ultra the mere transitus of them from the warehouse to the lighter, the company are entitled to an extra compensation to be settled by convention between the parties, as in other cases out of the act.

carriage :

carriage: the plaintiffs on the other hand contending, that they had a right for the same compensation to receive the goods from the warehouses across the quays, and by means of the cranes thereon into their lighters, and so to remove them by water carriage, as well as to receive and remove them immediately from the company's warehouses by land carriage. It appeared in evidence at the trial before Lord *Ellenborough* C. J. at *Guildhall*, that there was more risk, labour, and expence in shipping goods into lighters from the company's warehouses, where goods of this description are required to be kept, than into carts, &c. for inland carriage; because in the latter case the hogsheads are at once craned from the warehouses over the outer wall of the dock into the carts prepared by the owners to receive them in the public street: whereas in the other case the hogsheads are first craned from the warehouses into trucks upon the quay, in which they are dragged across the quay to the water's edge, there they are reslung in the cranes on the quay, and lowered into the lighters afloat in the dock along side of the quay. That more hands are required, and the damage to the company in case of any accident happening by the breaking of the tackling, much greater in this mode of delivery than in the other: because the lighter itself, and perhaps other goods in it, may be sunk and destroyed by the falling of so heavy a weight upon it. And all this additional labour must be performed by the company's servants, and the additional risk of accidents incurred by the company, inasmuch as for furthering and securing the general purposes of the act, none other than the company's servants are permitted to enter the dock gates for these purposes. That an extra charge had always been paid for these services at the old legal quays before the passing of the act, when the goods were carried across the quays again and shipped into lighters, which was considered as distinct from an order to deliver from the warehouse. That the labour and expence was still greater when the goods were intended for exportation than for home consumption; for in the former case there was the additional expence and trouble of weighing, and pitching and turning for cooperage, more of which latter was required for the purpose of exportation than was necessary for the mere removal of the goods into the owner's cart or lighter, for the purpose of safe delivery into the

1806.

HARDEN
against
SMITH.

[17]

[18]

1806.

HARDEN
against
SMITH.

the owner's possession. It was admitted, however, that extra cooerage for exportation had been always charged separately, and paid for accordingly.

The particular clause on which the question turned was s. 137. of stat. 39. *Geo. 3. c. 69.* which gives to the company certain rates on certain specified commodities, and other rates on all other unspecified goods "imported from the West Indies, "which shall be landed, unshipped, or discharged from on "board of any vessel entering into and using any of the docks," &c. to be paid "by the owners or consignees of such goods." "Which rates or duties shall be levied and collected as after "expressed, and *shall be accepted and taken for and in respect of* "the use and conveniency of the said docks, and the quays, wharfs, "and cranes, and other machines which shall belong thereto, and "the land-waiters' fees on account of such goods after being un- "shipped, and all charges and expences of wharfage, landing, "housing, and weighing such goods, and of such cooerage as the "same may respectively want after being unshipped, and all rent "for warehouse room for such goods for twelve weeks in the said "company's warehouses, and ALL CHARGES OF DELIVERING "THE SAME FROM THE SAID WAREHOUSES." The principal question arose upon these latter words, whether they extended to a delivery immediately from the warehouses across the quay, and by means of a second cramage, into a lighter in the dock alongside of the quay; or were to be confined to an immediate delivery from the warehouses landwise into the possession of the owner: in other words, whether the company were entitled to charge a reasonable compensation for wharfage and shipping, (which was the charge complained of and sought to be recovered back by these actions), as for a new and uncompensated service dehors the act; or whether the same services were included under the compensation paid upon the importation of the goods for the several services enumerated in the above-mentioned clause, including the charge of *delivering the goods from the warehouses.* Lord *Ellenborough C. J.* having, upon a view of the general provisions and objects of the act, adopted the latter construction, at the trial of the first cause at the sittings after *Michaelmas* term 1805, in consequence of which a verdict passed for the plaintiff; a rule nisi was obtained in *Hilary* term 1806, for setting aside the verdict and granting a new trial in order

order to have the point re-considered: and a similar verdict having afterwards been taken in the second cause, the like rule was granted in *Easter* term last.

In this term counsel were heard upon both rules; *Topping*, *Marryat*, and *Carr* for the plaintiffs, in support of the verdicts; and *Garrow*, Sir *V. Gibbs*, and *East*, for the company, in support of the rules for new trials. The argument turned altogether on the general view and the wording of particular clauses of the several acts of parliament for the government of the company; viz. the 39 *G. 3. c. 69.* 42 *G. 3. c. 113.* and 43 *G. 3. c. 132.* as explanatory of the meaning of the clause s. 137. of the 39 *G. 3. c. 69.* more immediately in question: which directs that the rates or duties, payable by the owners or consignees of goods brought into the docks and liable to be warehoused, shall be accepted and taken for (amongst other services there enumerated) "*all charges of delivering the same from the said warehouses.*" And now, the Court having looked

1806.

HARDEN
against
SMITH.

[20]

Lord ELLENBOROUGH C. J. delivered their judgment. The question in these cases turns on the construction of the 137th section of the stat. 34 *Geo. 3. c. 69.*, and comes to this single point, whether the West India Dock Company be bound, for the compensation given them in that section, to deliver the goods, which must be imported and landed on their quays *from their warehouses*, in any other way than that by which they may be removed by land carriage; or, whether the proprietor of the goods be not for that same compensation entitled to require that they shall be delivered to him in such a manner as that they may be removed by water, if he shall be disposed to have occasion so to remove them? Many sections of the act have been referred to, with a view of shewing from the separate and distinct mention which is therein made of warehouses, quays, and wharfs, and from the circumstance of there being different provisions as to each of them, that the legislature must have supposed that the warehouses, quays, and wharfs would not be so constructed as to enable the putting of goods into lighters directly from the warehouses themselves: and it has been also argued, from the greater degree of trouble and risk which must attend the removal of goods from the warehouses across the quays, and the putting them from thence into vessels, compared with that which

1806.

—
HARDEN
against
SMITH.

[21]

which is occasioned by the putting them immediately from the warehouses into carts; and also from the practice which obtained at the quays before the passing of the act in question; that the compensation provided in that section must be understood as extending to a delivery for land carriage only. But, it does not appear from any part of the act that the legislature had any particular construction of the quays or warehouses in its contemplation at the time; nor that it at all regarded the practice of the legal quays: for it gives no direction as to the one, nor at all refers to the other. It leaves it entirely to the discretion of the company to make their quays and warehouses in such way as in their judgment should be most likely to answer the purposes of their constitution as a company; and gives them a defined compensation for the advantages which the importer should receive, without any reference to what had been before paid elsewhere for similar benefits. The question therefore depends upon the mere legal construction of the 137th section of the act, by which the payment of the compensation to be received by the company for the conveniences of their dock, quays, and warehouses, is divided between the owners of the ship and of the goods. The owner of the ship is to pay a certain rate per ton for the use of the dock, for the expences of navigating, mooring, and managing the vessel, for the use of the dock for light ships, for unloading and unshipping her cargo, (i. e. for the labour employed, and conveniences afforded for such unloading,) for the landing-waiter's fees, and the cooperage required in unloading. These matters the legislature considered as being expences to which the owners of the ship should be subjected: for by the clause in question they are directed to be paid by the master or the owner. For the goods, the owner or consignee was to pay according to certain rates specified in a table or list; and those rates are described as levied and taken for the use and conveniency of the docks, for the quays, wharfs, cranes, and other machines, for land-waiters' fees on account of the goods *after being unshipped*, (which latter words must be confined to the land-waiters' fees, and do not ride over the preceding matter; for they are repeated again after the mention of cooperage, and are not deferred to the conclusion of the sentence, which they naturally would have been if they had been meant as generally restrictive;) and for all charges of
landing

[22]

1806.

HARDEN
against
SMITH.

landing, wharfage, housing, and weighing, for cooperage, for warehouse-room, *and all charges of delivering the same from the said warehouses.* Now as the rates are to be taken in satisfaction of *all charges of delivering the goods from the warehouses,* if the use of the quays and cranes be necessary for the purpose of such delivery, no claim can be made on that account, though it should be admitted that several of the things specified will be satisfied by the use made of them in the importation and landing. If the goods be delivered into carts, it is not contended on the part of the defendant that any thing is to be paid for the cranes used in such delivery: and if the plaintiffs are entitled to have their goods delivered into a lighter, by parity of reasoning no compensation can be claimed for the use of the necessary machinery and of the quay employed and used on such occasion. This brings the question to the single point, whether the company can say they will adopt only one mode of delivery? Now it has been truly observed that the legislature must have been aware that much of the produce of the West Indies would be removed by water as well as by land, and delivered from the warehouses into lighters, as well as into carts; and, if it had intended that the compensation which it has given should be confined to a delivery for land-carriage only, one cannot but suppose that it would have so said. It has been argued that, as no mode is pointed out for delivery, the mode of delivery is left to the company, and that they may fix on that which they think best. But it rather seems, that the legislature meant the delivery to be made in all the ways in which, according to the nature of the subject matter, it could conveniently be, and had in fact usually been made. And it would be a violent construction of the act to hold that when goods under certain circumstances might be much more conveniently delivered in one way than another, that the legislature intended to invest the company with a right of refusing to deliver them in the most convenient way. It should rather in point of reason seem that the mode of delivery should be left to the election of the owner of the goods, whose interest is to be advanced by the delivery, and who must necessarily do the first act towards a delivery, by sending either a land or water carriage for them. As to the argument in favour of the defendant from the extraordinary labour and risk in delivering

[23]

1806.

—
HARDEN
against
SMITH.

on board lighters, beyond what would have been incurred by delivering for land carriage; that has no foundation; as it does not appear that the legislature looked particularly, much less solely, to the latter mode of delivery when the fixing of the compensation came under its consideration. If indeed that had appeared, it might have had some weight. And if we suppose the legislature to have adverted to the necessity of building the warehouses at some distance from the parts of the dock where lighters would come, it must in that case be presumed that in fixing the gross quantum of compensation the probability of such extra trouble and risk was adverted to as an ingredient in forming that calculation. It was admitted in the argument that a delivery *from* the warehouse did not necessarily mean a delivery *at* the warehouse, if a delivery at the quay should appear to have been intended. And such

[24] must have been intended, unless the act, (and that too without any thing being said in it to narrow the modes of delivery,) is to be construed as giving a right to, and a compensation for, one mode of delivery only, when there existed at the same time another equally obvious one, and which would in many cases be much the most beneficial. The act must be construed by its words, that is, by what it has said, and not by the consideration of extrinsic matter, which it has not mentioned or adverted to; such as extraordinary trouble, risk, &c.

In giving this opinion it must not be understood that more is meant than that the owner of the goods is entitled to have such a complete delivery of them made to him for the amount of compensation limited by the act, as may enable him to carry them away either by land or by water, at his election. It is not meant that any thing necessary for purposes beyond the mere act of safe delivery into the proper medium of conveyance by land or water can be claimed of the company; or that the owner of the goods has any right to have the period of their passage from the warehouse to his cart or lighter, when once begun, prolonged or interrupted for any other collateral or distinct purpose to be answered thereby; and that upon such purpose being answered, the company are bound to take them up again *de novo*, and to proceed with the conveyance of them to his lighter. Such a transaction does not appear to us, as at

present.

present advised, to fall within the provisions of this act of parliament; and we are desirous that no inference may be drawn from what is now said that the company may not in such case be entitled to ulterior compensation. It will however be time enough to decide upon such question when it shall hereafter arise. For the reasons already given we are of opinion that the plaintiffs in these cases are entitled to retain the verdicts they have obtained, and that of course the rules nisi for new trials must be discharged.

1806.

HARDEN
against
SMITH.

[25]

The KING *against* The Inhabitants of CROMFORD.Wednesday,
Nov. 12th.

UPON appeal against an order of two justices removing *Mary Higon* from the township of *Worksworth* to that of *Cromford*, in the county of *Derby*, the Sessions confirmed the order, subject to the opinion of the Court on this case.

The pauper's husband *Wm. Higon*, being settled at *Cromford*, went on the 1st of *May* 1796, being then 14 years of age, as an apprentice to *N. Kniveton* of *Worksworth*, weaver, and continued to serve him as an apprentice for 5 years. The following indenture was executed by *N. K.*, the master, and *Job Higon*, the father of *William*, but not by *William Higon* himself. "This agreement made the 1st of *May* 1796 between *N. K.*, weaver, and *Job Higon*, miner; and the said *N. K.* shall teach or cause to be taught *Wm. Higon*, the son of *Job Higon*, the art and mystery of weaving, &c. in the best way he can, for five years from the date above; and that *N. K.* shall find *W. H.* all utensils belonging to the said business; and that *W. H.* shall receive of *N. K.* half of what he earns, and the remainder to *N. K.*: to which we have interchangeably set our hand and seal, the date above written. (Signed and sealed by *N. Kniveton* and *Job Higon*.)" *William Higon* did not execute or become a party to any other indenture.

* *Clarke* was to have argued in support of the order of Sessions; and *Balguy jun.* against it: but upon the first opening of the

Where the master and father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving for five years, and find utensils, and the son should receive half his earning, and the master the other half; under which the boy served out the time as an apprentice: held that this agreement between the father and master (to which the son was no party) not binding the

son, or the father for him, to any service to the master; but the son's service in fact being merely voluntary; was no apprenticeship in point of law; and consequently no settlement could be gained by the son serving his master under such a contract.

1806.

—
CLARK
against
ASKEW.

court of conscience act 23 *Geo. 2. c. 33.* considered that no case would be within it where the original debt, being above 40s., was reduced below that sum by a balance of accounts; because, as he said, the most intricate accounts between merchant and merchant might by that means come to be decided before a county court.

·Sir *V. Gibbs*, in support of the rule, distinguished this from the case where the plaintiff's demand is reduced below 40s. by means of a set-off arising upon a different account; because the plaintiff's debt is still above 40s., and till plea pleaded it is uncertain whether the defendant will avail himself of his set off: and if the plaintiff only brought his action for the balance, the defendant not availing himself of his set-off, the plaintiff would be concluded. But here the plaintiff's debt was reduced below 40s., by actual *payments* on account, before the action brought.

The Court, though they considered that the construction contended for by the plaintiff pressed hard against the words of the act, yet thought at first that the case was governed in principle by the former decision; but they desired to hear read the words of the *Middlesex* act, on which that construction was put, to see how far they corresponded with the *Southwark* act. And it appearing that the *Middlesex* act 23 *Geo. 2. c. 33. s. 19.* enacts "that in case any action of debt or assumpsit shall be commenced in any of the King's courts at *Westminster*, and the defendant shall live, &c. in *Middlesex*, and the jury upon the trial of such cause shall find the damages for the plaintiff under the value of 40s.; unless the Judge shall in open court certify on the back of the record, that the freehold, &c. or any act of bankruptcy principally came in question, &c. the defendant shall recover double costs;"

[30]

Lord ELLENBOROUGH C. J. intimated a strong suspicion that the attention of *Ld. C. J. Eyre* in the case referred to had not been called particularly to the words of that act, which seemed hardly capable of receiving the construction which had been put upon them; for they are peremptory, that the defendant shall recover his costs in case the jury upon the trial of the cause shall find damages for the plaintiff under 40s., unless the Judge shall certify specially in certain cases, of which the case before the court was not one. The authority then of the opinion being out of the question, the facts here are brought directly within the

the words of the *Southwark* act; for it appeared upon the plaintiff's own shewing at the trial that his debt was under 40s. before the action commenced.

The other Judges concurring,

Rule absolute.

1806.

CLARK
against
ASKEW.

[31]

The KING against VALENTINE JONES.

Saturday,
Nov. 15th.

THE stat. 42 Geo. 3. c. 85. enacts (s. 1.) that any person employed in the King's service in any civil or military capacity, &c. out of *Great Britain*, guilty of any offence in the execution, or under colour, or in the exercise of any such capacity, &c. may be prosecuted in the Court of King's Bench in *England*, either upon information by the Attorney-General or indictment. And by s. 2. in case of such indictment found or information exhibited, the Court of K. B. may, on motion on behalf of the Attorney-General or other prosecutor, or of the defendant, award at its discretion writs of mandamus to any chief Justice and Judges, &c. or any court of judicature in the country or island, or near to the place where the offence shall be charged to have been committed, or to any governor, &c. or to any other person or persons residing there, as to the Court of K. B. may under all the circumstances of the case seem most expedient. And the persons to whom the writ is directed are authorized to take the examinations of witnesses in writing touching the matters charged in the indictment or information, and transmit the same to the court of K. B.; which examinations shall be allowed to be read as evidence on the trial.

This being the first case of a procedure under this act, to which the attention of the Court was called, it may be useful to report the course which was pursued. On a former day in the term the defendant, against whom an indictment had been found by a *Middlesex* grand jury on * the 25th June last, charging him with breaches of duty in his capacity of commissary general

A defendant indicted here for misdemeanors committed by him in the West Indies in a public capacity under st. 42 G. 3. c. 85. is not entitled under that statute upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of mandamus to the courts, &c. abroad to examine witnesses; which are directed to be issued in such cases at the discretion of the court of B. R. but he must lay before the court such special grounds by affidavit as

may reasonably induce them to think that the witnesses sought to be examined are material to his defence. But the prosecutor in such case is of course entitled to writs of mandamus for the like purpose.

1806.
 —
 The KING
against
 JONES.

of stores, provisions, and forage to his Majesty's forces in the *Caribbee Islands*, &c. in 1796 and 1797, obtained a rule calling upon the prosecutor to shew cause " why several writs of mandamus should not issue, directed to the Chief Justice and Judges of the courts of (a)——for the several islands of *Barbadoes*, *Grenada*, and *Dominica*, in the *West Indies*, respectively requiring them to hold courts with all convenient speed for the examination of witnesses and receiving other proofs concerning the matters charged in the indictment in this prosecution : and in the mean time to cause such public notice to be given of the holding of the said courts respectively, and to issue such summons or other process, as may be requisite for the attendance of witnesses, and to adjourn from time to time as occasion may require, pursuant to the stat. 42 *Geo.* 3. for the trying and punishing in *G. B.* persons holding public employments, for offences committed abroad, and to perform all such other matters and things as by the said statute is required : and why the examination and proofs to be thereupon taken should not be transmitted by some person or persons coming from the said islands respectively, and to be delivered upon oath, in such form as this Court should direct, to *H. D.* and *H. B.*, the clerks in court of this court, or one of them, in the Crown Office, for the safe custody thereof, and in order to their being read in evidence on the trial of the issue joined in this prosecution, or any other subsequent proceedings thereon or relating thereto : and *why the trial should not be put off until the return of the said several writs of mandamus* : upon notice of this rule to the attorney or agent of the prosecutor in the mean time."

[33]

This rule was obtained upon an affidavit of the defendant, which, after stating generally that an indictment had been found against him, charging him with breach of duty in his capacity of commissary general of stores, &c. in 1796 and 1797, (as before mentioned) concluded, in the common form of an affidavit for putting off a trial on account of the absence of a material witness, that certain persons (by name) and several other persons were now in the *West Indies*; and that *he was advised and believed* that their evidence would be *material* for him upon the trial. And on the day given for shewing cause,

The Attorney-General, for the crown, said, that he thought it his duty to state the circumstances under which the application

(a) The proper description of these courts was afterwards supplied.

was

1806.

The King
against
JONES.

was made to the court, not with a view of opposing it, if the Court in the exercise of the discretion vested in them by the act thought it proper to be granted ; but rather to call their attention to it, that it might not pass as a matter of course. For this purpose, after adverting to the object of the statute, he stated the rule, and the affidavit on which it had been obtained : in doing which the attention of the Court was called to the generality of the defendant's affidavit for putting off the trial till the return of the writs prayed for: and Lord *Ellenborough* C. J. intimated his opinion that the affidavit was not sufficiently full for the purpose ; omitting, as it did, to shew in what respect the evidence of the witnesses (some of which he also observed were not named) was material. The act of parliament, he said, required the Court to exercise their *discretion* upon the subject of awarding any writ of mandamus under it; and therefore called upon the party applying for such writ to lay before the Court some materials on which to exercise that *discretion*. In common cases where application was made to put off the trial, if nothing appeared to induce a suspicion that the application was made for delay, the Court were satisfied with an affidavit in the common form, for postponing the trial upon the absence of a material witness from one sittings or assises to the next, because little inconvenience comparatively was likely to arise from a short delay : but here from the very nature of the proceeding much longer delay must intervene: and this too in a criminal case, which it was more necessary to watch over, from the temptation to offenders to gain time.

[34]

Park, in support of the rule, said that the affidavit was in the same form as in *Picton's* case, the only other instance of a proceeding under the act in question ; and similar to the form of affidavits for the like purpose, to obtain depositions in the *East Indies* under the stat. 24 *Geo.* 3. c. 25.

LAWRENCE J. Where justice is to be delayed so long, as in these cases it must be when the trial is postponed till the return of the writs of mandamus, the Court ought to have some special grounds laid before them to induce a probability at least that the evidence sought to be obtained may be material. Such appears to have been the intention of the act; and I see no difficulty in the defendant's doing so. It is not required of him to state his evidence, but only the nature of it: otherwise, under this general form of affidavit, he may delay the trial merely to
get

1806.

The KING
against
JONES.
*[35]

get depositions of witnesses to his character. But it is the constant practice at the *Old Bailey* not to put off trials for the *absence of witnesses to character only, on account of the facility of making such applications in delay of justice.

Park then said, that if the Court required an affidavit from the defendant, that the application was not made for the purpose of delay, such an affidavit might be obtained: but it could not be expected of a defendant to disclose his defence before the trial. And in the interpretation of the statute some consideration ought to be had to the difficulty thrown upon the defendant of preparing for his defence at so great a distance from the place where offence charged was committed, and where most of the witnesses to the transaction reside.

Lord ELLENBOROUGH C. J. observed, that the Court would not be satisfied merely with a general affidavit that the application was not made for delay; but that they should expect materials to be laid before them to enable them to say, exercising their judgment upon fair and probable grounds, that the evidence sought to be obtained was in its nature material.

The case stood over for a few days. And now another affidavit of the defendant was produced, stating in substance that the indictment was found on the 25th of *June* last, to which he had pleaded without delay. That certain persons (naming them) were acquainted with several of the dealings and transactions which took place between the defendant and *Matthew Higgins* in the indictment mentioned in the *West Indies* in 1796 and 1797, relating to the supplying the vessels stores and provisions, &c. in the indictment mentioned. And that amongst the other witnesses, referred to but not named in the defendant's first affidavit, resident in *Barbadoes*, &c. or some of the other Leeward Islands, whose evidence he was advised and believed would be material for him on the trial, was *W. W.*, who he believed was now resident in *Barbadoes*; and who during the year 1796 and 1797 was the clerk and book-keeper of the said *M. Higgins*, at head quarters; and who kept and settled many accounts between the said *M. H.* and the defendant, respecting the vessels, stores, &c. supplied by *M. H.* for the use of the *British* army; and on the departure of *M. H.* was left as his attorney, and as such had other dealings on the same account with the defendant, and received payments on account. And it concluded with stating that the application was

[36]

was

was not for delay, but to obtain evidence, which the defendant was advised and believed to be material.

1806.

—
The KING
against
JONES.

The *Attorney-General*, after stating the above, which he seemed to think satisfactory, adverted to the form of the rule, which he proposed to amend by inserting the proper styles of the Courts in the several islands, to which the respective writs of mandamus were to go; and that to *Barbadoes* was proposed to be directed to the governor or eldest member of the council for the time being. He also prayed for other writs of mandamus as of course, on the part of the prosecution: stating that it was impossible for him to produce any affidavit as to the witnesses' names or the objects of their examination, as those must depend upon the nature of the examinations taken by the defendant; some of whose witnesses were not even named.

LORD ELLENBOROUGH C. J. said that the application just made by Mr. Attorney-General on the part of the crown was of course to be granted, without requiring an affidavit; as the necessity of it was apparent upon the face of the proceedings. And with respect to the application made by the defendant, there was now a satisfactory affidavit to induce the Court to exercise their discretion in issuing the writs required. But, he added, that it must not be understood that the Court, in requiring such an affidavit, had departed from ancient usage and introduced a new rule: for in the case of *The King v. Le Chevalier D'Eon*, 3 Burr. 1513, upon an application to put off the trial upon an affidavit of the absence of material witnesses, in the common form, it was, after a full hearing, rejected by the Court; who said that an affidavit in the common form might be sufficient where no cause of suspicion appeared to the Court: but that where a suspicion arose from the nature of the question, the Court would examine into the ground upon which the delay was asked, and had in criminal as well as civil cases refused to put off a trial: in such a case it was not sufficient to swear in the common form that the witnesses were *material*, but the Court would require a special affidavit to satisfy them that the persons were material witnesses, before the trial was put off on account of their absence.

[37]

The Court now directed the issuing of the several writs of mandamus prayed for on the part of the defendant and of the crown.

1806.

Tuesday,
Nov. 18th.JOHNSON *against* HODGSON and Others,

An inclosure act having directed that the allotments made by the commissioners should for ever remain for the benefit of the appointees; held that an award and assignment of the *herbage* of a certain close to the *surveyors of the highways* and *their successors*, for the benefit of the parish of *B.* though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take; the same as if the terms of the award had been specifically enacted. And the lord of the manor, in whom the fee of the soil remained, is a trustee for the surveyors of the highways for the time being.

TRESPASS for breaking and entering a certain close of the plaintiff at *Bridlington*, in the county of *York*, and depasturing, and taking the herbage there. The defendant justified under an act passed in the 8th of *Geo. 3.* for dividing and inclosing the open fields and commons in *Bridlington*, and for extinguishing the right of common on certain ancient inclosures there; whereby it was enacted, that all the said open fields and commons should be divided and allotted by certain commissioners and that it should be lawful for them to *assign and allot* such parcels of land in *Bridlington Moor*, &c. as they should adjudge most convenient for digging and getting gravel or other materials for the repairs of the roads in *B.* and for the common use of the inhabitants thereof, or for any other public and necessary purpose the commissioners should think proper for the convenience or utility of the township of *B.* and that *all the grass and herbage* upon the parcels set out, for getting materials for the repairs of the highways, &c. *should be and for ever remain to and for the use and benefit of such persons as the commissioners should award, order or appoint:* whose award to be drawn up within 4 months after the allotments made, and to be signed and sealed by the commissioners, and enrolled, should express the quantity, &c. of each parcel, *assigned and allotted* to every of the parties interested therein, and should contain such other orders, regulations, &c. as should be proper or necessary to be inserted therein, according to the tenor and true meaning of the said act: and that the several allotments and divisions, and all orders, &c. made in the award, should be binding and conclusive upon all the parties interested. The plea then averred that the allotments were made, and an award drawn up by the commissioners, expressing the quantities allotted, &c. with their abutments and boundaries, and such other orders, &c. as were proper or necessary to be inserted therein, &c.: and that such award was engrossed, signed and sealed, and enrolled &c.; by which award

1806.

—
JOHNSON
against
HODGSON
and Others.

the commissioners awarded, allotted, assigned, and set out the locus in quo, for the purpose of digging for and getting stone and other materials for the repairs of the roads within *B.*: and after seven years from the date thereof *they did assign and award the herbage of the same allotment to THE SURVEYORS OF THE HIGHWAYS* within the township of *Bridlington* and *THEIR SUCCESSORS for the time being*, and also the grass to be mown thereupon, in the mean time to be by them annually let and disposed of in aid of the highway tax within the township. The plea then stated, that at the end of the seven years, and before the trespass complained of, the defendants *Hodgson* and *Paul*, and one *C. S.* being surveyors of the highways within *B.* did, by virtue of the said act and award, let the herbage of the locus in quo to *R. G.* for a year, under whom the defendants justify the entering and taking the grass and herbage during the said letting. To which there was a general demurrer and joinder.

Littledale, in support of the demurrer, argued that the assignment by the commissioners of the herbage to the surveyors of the highways and *their successors* for the time being was void in point of law, they not being a corporation, nor capable of taking by that description in perpetuity. The legislature cannot be taken to have intended to give the commissioners a power of making any other sort of assignment than the law in general recognizes. The surveyors then to whom the assignment was first made would only take during their continuance in office, and certainly not longer than for their own lives; and it does not appear that these under whom the title is made were the same.

[40]

LORD ELLENBOROUGH C. J. If the act itself had directed the herbage to be taken by the surveyors of the highways for the time being, would it not have been binding upon all persons? And this is the same in effect; for the act empowers the commissioners to do that which itself might have done. The surveyors for the time being do not take by way of grant, but by way of parliamentary declaration designating the persons who are to take and enjoy the herbage. By analogy to a common law conveyance the objection would be good; but here they claim under the act. That which has been done through the instrumentality of the arbitrators is the same as if directed specifically by the act; as if the award had been set out in the act. If they have allotted the herbage only, the lord of the manor in whom
the

1806.

the fee of the soil is will be a trustee for the surveyors for the time being as to the herbage.

JOHNSON
—
against
HODGSON
and Others.

LE BLANC J. The fee will remain where it was before the allotment.

Per Curiam,

Judgment for the Defendants.

Holroyd was to have argued for the defendants.

1806.

Wednesday,
Nov. 19th.

The KING *against* F. KINGSTON, J. ELLIS, J. WALLIS,
W. HART, J. N. BACON, W. BACON, G. SHERIFF,
W. WELLS, and J. WELLINGHAM.

THE indictment stated, that by an act of the 44 *Geo.* 3. for paving, lighting, and regulating, &c. the streets of the borough of *St. Alban's*, reciting that the streets were subject

1. It is no objection on demurrer that several different de-

fendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the court to quash the indictment.

2. The *St. Alban's* paving and regulating act, 44 *G.* 3. empowers five commissioners, assembled at a public meeting holden by virtue of the statute, to do certain acts; amongst others, to deliver notice in writing to any inhabitant to abate nuisances and encroachments in the street before their houses; and, on failure, empowers the commissioners to abate them; and gives an appeal to the Q. Sess. of the borough "against any matter or thing to be done by the commissioners in pursuance of the act;" held that an appeal lay against such notice in writing; such construction being within the words of the act, &c. and most beneficial for the commissioners themselves, as well as for the inhabitants whose property was to be affected by such acts.

3. Though the act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or appeal, for any cause relating to the act, or any thing done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer," it does not extend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them; however, they may afterwards recoup themselves out of the fund in the treasurer's hands.

4. And an indictment against certain commissioners for a contempt of an order of sessions in not paying such costs, stating, generally, that the party appealed to the sessions against such notice in writing under the hands of five commissioners acting in the execution of the statute, and which notice was made, or purported to be made, under the powers to them given by the act, seems sufficient; for the Court will presume, as against the persons issuing such notice, that it was signed by them when lawfully assembled at a public meeting holden by virtue of the act.

5. But counts in the indictment stating an appeal against a notice in writing, signed by *A. B. C. D.* and *E.* five of the commissioners, and an order by the sessions that the commissioners acting under the statute and being the respondents in the said appeal, on service of the said order, should pay the appellant 10*l.* costs of appeal; and alleging service of the order on those five and others acting as commissioners, &c.; and then charging that at a subsequent meeting held by virtue of the act, *A. B.* (omitting *C.*) *D.* and *E.* and also *F.* and *G.* commissioners, were present and acting, and formed a majority, a demand of the 10*l.* costs was made on those six, which they refused to pay: and other like counts, charging service of the order upon part only of those who were indicted for a contempt of it, were, on general demurrer, holden bad. And the offence being laid jointly against the several sets of defendants in each count, the Court could not give judgment, on such an indictment, even against the four who were parties to the appeal, and on whom service of the order was alleged, there being no one count including those only.

to

1806.

—
The KING
against
KINGSTON
and Others.

to various encroachments and nuisances, it was enacted, that the mayor, aldermen, &c. of the borough and their assistants, and certain persons therein named (amongst whom were the defendants) should be commissioners for putting the act into execution; that they should meet for that purpose from time to time; that not less than five should constitute a meeting; but that any five or more assembled at a public meeting, &c. might execute the powers of the act, and “*that no act of the said commissioners should be valid unless done at some meeting to be held by virtue of the said act.*” And it was further enacted, “that if any persons should think themselves aggrieved by any rate or assessment to be made, or other matter or thing to be done in pursuance of the said act, such persons might appeal to the quarter sessions for the borough within six months, &c. such appellants first giving 14 days notice in writing of appeal, &c. to the clerk or treasurer to the said commissioners, or one of them, *and within four days after such notice entering into recognizance before a justice of the peace, &c. with two sufficient sureties conditioned to try such appeal, and abide the order, and pay costs, &c.* And that the justices at sessions should hear and finally determine the appeal in a summary way, and award costs, &c.; and their determination be conclusive,” &c. The indictment then stated, that the defendants, *Kingston, Ellis, Wallis, Hart, J. N. Bacon, W. Bacon, Wells, and Wellingham*, named in the act, took on themselves the office and duty of commissioners for executing the act, &c.; and that *Robt. Russell* and (the other defendant) *G. Sheriff* were at the time assistants to the mayor, &c. and also took on themselves the office and duty of commissioners, &c. That *J. C. Gape*, clerk, being then resident within the borough, and the owner of a dwelling-house and premises there, and within the jurisdiction of the commissioners, did duly and according to the directions of the act, on the 25th of *May* 1805, appeal to the justices of the peace at the general quarter sessions for the said borough next ensuing, &c. *against a certain requisition in writing and notice under the hands of the said F. Kingston, J. Ellis, R. Russell, J. Wallis, and W. Hart*, five of the said commissioners so acting in the execution of the said act, and dated the 20th of *May* 1805, before then given to the said *J. C. Gape*; and which said requisition or notice in writing was made or *purported to be made under the powers* to them given by the act, and

against

[48]

1806.

The KING
against
KINGSTON
and Others.

against the order or orders in pursuance whereof such notice or requisition was or might have been given; and *by which said requisition J. C. Gape was required at his own costs and charges within 7 days from the date, &c. to cause the projection or annoyance therein-after mentioned belonging to the house in his occupation in the borough to be removed, &c. i. e. he was required to remove the rails in the streets near his dwelling-house; and the commissioners thereby gave him notice that in case he neglected or refused so to do, they would cause the same to be done, and that the costs and charges thereof would be levied in the manner directed by the act. That J. C. Gape gave 14 days notice in writing of his intention to appeal, pursuant to the statute, to the clerk of the commissioners, and did in all respects conform to the directions and regulations respecting the said appeal, as was by the said act required. That at the borough sessions, &c. holden on the 19th July 1805, to which he had so given notice to appeal, the said appeal, wherein the said J. C. Gape was appellatant, and the commissioners acting under the said act were respondents, was heard before the said court of quarter sessions, &c. when that court allowed the appeal, and ordered that the order and requisition in writing before mentioned, dated the 20th of May 1805, and all orders, matters, and things whereon it was founded, or which had been done in pursuance thereof, should be quashed. And it was further ordered by the said Court, that the commissioners acting under the said act of parliament, and being the respondents in the said appeal, on service of the said order of quarter sessions, &c. should pay to the said J. C. Gape 10*l.* for the costs of the said appeal. That the said order of sessions was, on the 2d of April 1806, duly served upon the said F. Kingston, J. Ellis, R. Russell, J. Wallis, and W. Hart, and others acting as commissioners in the execution of the said act, and they, the said F. K^g, J. E., R. R., J. W., W. H., and the said commissioners, were required to pay the said costs so ordered. That at a certain meeting, duly held by virtue of the said act, of the said commissioners acting in execution of the said act, on 11th April 1806, the said F. Kingston, J. Ellis, J. Wallis, W. Hart, J. N. Bacon, and W. Bacon, did attend as such commissioners, and acted in the execution of the act; and that the said F. Kingston, J. Ellis, J. Wallis, W. Hart, J. N. Bacon, and W. Bacon, were the majority of*

[44]

1806.

—
The KING
against
KINGSTON
and Others.

[45]

the commissioners so assembled, and had full power and authority under the act to order that the said 10*l.* so ordered by the sessions, &c. to be paid to *J. C. Gape* should be paid to him, and were all requested to pay the said 10*l.* &c. *That the said F. Kingston, J. Ellis, J. Wallis, W. Hart, J. N. Bacon, and W. Bacon*, not regarding the said act, nor the said order of sessions, &c. did unlawfully, wilfully, and contemptuously neglect and refuse, and have hitherto neglected and refused to pay to the said *J. C. Gape* or to order to be paid the said 10*l.* so ordered to be paid to him, &c. for the costs of the said appeal, &c. in contempt, &c. and against the peace, &c. The 2d count, which was in substance the same, charged the same persons. The 3d count charged *Kingston, Ellis, Wallis, Hart, J. N. Bacon, Wells*, and *Sheriff*, as commissioners, &c.: And the 4th count charged *Ellis, Hart, Wells, J. N. Bacon, Wellingham*, and *W. Bacon*, commissioners, &c., with like offences, in refusing to pay the 10*l.* costs of appeal. These counts stated the same preliminary matters as the first: and, in answer to a question afterwards put by the Court to the defendant's counsel, were admitted to be open to the same sort of objection as finally prevailed against the first count. The defendants demurred generally to all the counts.

[46]

Wood, in support of the demurrers, objected, 1st. to the form of the indictment, that the offences charged in the several counts are against different defendants; which offences, being in their nature several and distinct, cannot properly be joined in the same indictment. The first and second counts charge six defendants, viz. *Kingston, Ellis, Wallis, Hart*, and the two *Bacons*, the two latter of whom were no parties to the appeal, omitting *Russell*, who was a party. The 3d count charges seven defendants, omitting *W. Bacon* before charged, and including *Wells* and *Sheriff*, new parties. The fourth count charges six defendants, including *Wellingham*, who was not mentioned before. This he argued was a misjoinder of counts against different sets of offenders, unprecedented, and tending to embarrass them in their defence; and not like charging the same defendants with different offences ejusdem generis in different counts. And that if the Court would have quashed the indictment on motion for this misjoinder, a fortiori they would do so on demurrer.

The

The Court, however, over-ruled the objection. And by

1806.

—
The KING
against
KINGSTON
and Others.

LORD ELLENBOROUGH-C. J. This would have been a good ground of application to the discretion of the Court to quash the indictment for the inconvenience which may arise at the trial from joining different counts against different offenders; but where to the offences so charged in different counts there may be the same plea and the same judgment, there is no authority for saying that such joinder in one indictment is bad in point of law; nor is there any legal incongruity on the face of it, to warrant us in giving judgment for the defendants on demurrer.

LAWRENCE J. referred to several authorities to shew the legal congruity of such a joinder of counts; though he agreed that it was matter of discretion for the Court on motion to quash an indictment so framed. In *2 Roll. Rep.* 345. the case is stated of an indictment against four persons for erecting four several inns, and selling victuals to travellers ad commune nocumentum: and it was quashed, because it was not alleged that they *separaliter* did the acts, and several acts are attributed to them jointly. *For though four for several offences may be indicted in the same indictment*, it is as several indictments in law; and the form shall be *separaliter* erexerunt. And Lord Hale (*2 Hale P. C.* 174.) after giving some instances of indictments against several for separate acts of the same kind, which were quashed, refers to the same case which is reported in *2 Rol.* as laying down the rule, that for several offences of the same nature several persons may be indicted in the same indictment; but then he says it must be laid *separaliter*; for want of which word that indictment was quashed. And he adds that “it is in common experience at this day that 20 persons may be indicted for keeping disorderly houses, &c. and they are daily convict upon such indictments; for the word *separaliter* makes them several indictments.”

[47]

The other Judges concurring to over-rule this objection (a);

Wood proceeded to state other objections. 2dly, the appeal is given on condition only of giving 14 days notice to the clerk of the commissioners (which is averred to have been done) *and within 4 days after such notice entering into recognizance before a justice of peace, &c. with two sufficient sureties*, to try, &c.: of which performance is not specifically averred; and the

[48]

(a) Vide *2 Hawk. c.* 25, s. 39.

1806.

The KING
against
KINGSTON
and Others.

[49]

want of such averment is not supplied by the general allegation that the prosecutor *did in all respects conform to the directions and regulations respecting the said appeal, as was by the said act required.* As in *Ladbroke v. James (a)*, an insolvent act having empowered the quarter sessions to discharge certain persons who had surrendered before a given time; it was holden, that in pleading a discharge by that court, it was necessary to allege that the party was in prison, or had surrendered himself before that time; and that it was not enough to say that he was *duly* discharged by the court, &c. (To this nothing was said at the time *(b)* by the Court.) 3dly, It is only stated that a notice or requisition in writing was given to the prosecutor by five of the commissioners to remove the nuisance: but it is not alleged that such requisition was made, or any order given for the making it, at any *public meeting held under the act*; without which the requisition itself was purely void, and no appeal would lie against it. (To this it was answered by Lord *Ellenborough C.J.* and *Le Blanc J.* that the indictment alleged that the requisition was, or purported to be, made under the powers given to the commissioners by the act: and that as against them it was evidence that they were acting in their public capacity; and that the Court would intend that it was done by them when lawfully assembled.) 4thly, He contended that such a requisition in writing to remove a nuisance was not the subject of appeal, upon the true construction of the act, which was only given against the infliction of penalties to be levied before magistrates. But that as to the removal of nuisances, which may be done by order of the commissioners, if the parties upon such notice will not themselves remove them, the act meant to vest an entire discretion in the commissioners, and not to transfer it from them to the quarter sessions: leaving the party to his remedy by action

(a) *Willes' Rep.* 199.

(b) At the conclusion of the case Lord *Ellenborough* seemed to think that the general allegation of conformity to the act was not sufficient to supply the want of a distinct averment that the appellant had, within 4 days after notice of appeal, entered into recognizance &c. with two sufficient sureties: But *Espinasse*, for the prosecutor, stating that he meant to contend that that, being merely an inducement to the charge in the indictment, might be stated generally; and referring to *Wright's case*, 1 *Ventr.* 170. and *Hart's case*, *Cro. Jac.* 473: Lord *Ellenborough* said, that without deciding that point, the other objection (which was afterwards lastly taken) was decisive.

1806.

The KING
against
KINGSTON
and Others.

[50]

of trespass if they exceeded their jurisdiction. [To which Lord Ellenborough C. J. and Lawrence J. said that it was a more beneficial construction, even for the commissioners themselves, to give the appeal before the act, which might subject them to be treated as trespassers, was done: and the words of the act were sufficient for that purpose; giving the appeal (p. 26.) to any person aggrieved by any rate, &c. to be made, *or other matter or thing to be done in pursuance of this act (a)*: and it is hardly to be supposed that the legislature could have meant to give the commissioners a discretion, without appeal, to pull down part of a man's house, and leave him to his remedy by action of trespass: and in point of discretion the quarter sessions of the borough were as likely to be as good judges of local nuisances as the commissioners.] 5thly, He objected that the commissioners were not personally liable for the costs of appeal; but that the order of the sessions for the payment of the costs should have been carried to the treasurer; and that if he, having sufficient funds in his hands, had refused payment, he would have been indictable. In support of this objection he referred to various clauses of the act. (p. 7.) "The commissioners shall sue and be sued in the name of the treasurer." (p. 10.) "No contract which shall be made by any of the commissioners for any of the purposes of this act shall be binding on them as individuals in their private capacities; nor shall any of them personally, or their respective estates, be answerable for or subject to the payment of the interest of monies, &c. And that all the money which shall be paid, expended by, or *recovered against any of the said commissioners or their treasurer*, or any person employed by them, by means of any action, prosecution, proceeding at law, or *appeal* for any cause relating to this act, or any thing done by or under the authority of the same, shall be borne and defrayed out of the money which shall come to the hands of the treasurer to the said commissioners by virtue of this act." The indictment charges that the defendants, commissioners, neglected and refused *to pay or to order to be paid* the costs of appeal to the prosecutor: but no clause of the act requires them to pay or to make such order for payment: nor is it even stated that there was any money in the

(a) Vide *Bennell v. Beighton*, 5 Term Rep. 187.

1806.

The KING
against
KINGSTON
and Others.
*[51]

hands of the treasurer out of which such payment could have been * made : but this is an attempt to make the commissioners personally liable for the costs (a).

LORD ELLENBOROUGH C. J. There is nothing in the act to bar a recovery against the commissioners themselves in the first instance for the costs awarded against them. The principal clause referred to (p. 10.) speaks of money to be recovered *against the commissioners* ; which assumes that they would be subject to such recovery. Though when the money is recovered against them, for acts done in their public capacity, they may recoup themselves out of the money in the hands of their treasurer.

LAWRENCE J. According to the construction contended for, if, after notice to a party to abate a nuisance, he neglected to do so, and the commissioners thereupon directed it to be done, they would not be liable for the charges of the workmen if there was no money in the hands of their treasurer. Suppose a recovery against the commissioners in an action of trespass for an act done by them in their public capacity ; can it be contended that they would not be personally liable to execution upon the judgment for the damages and costs ; however they might afterwards come upon the funds in the hands of their treasurer to reimburse themselves. There is nothing in the act to discharge the commissioners from being personally liable for their own acts.

[52]

Wood then objected, 6thly, that at any rate only the five commissioners, *Kingston, Ellis, Russell, Wallis, and Hart*, who signed the requisition in writing, against which the appeal was made, would be liable personally for the costs ; and there could not be judgment against the nine defendants for the acts of four of them, together with *Russell* the fifth not made a defendant, when each of the counts charges some other besides the four, and some of them are not stated to have been served with the order of sessions :

Espinasse, contra, was called upon by the Court to answer this last objection ; and was asked if the charge was not vitious in every count in charging a service of the order on part only

(a) See upon this point *Leader v. Moxton*, 3 Wils. 461. and 2 Blac. Rep. 924, and *The Governor and Co. of British Cast Plate Manufacturers v. Meredith*, 4 Term Rep. 794.

of those who were indicted for non-payment of it : and offering no answer to this, the court waived hearing any further discussion on other points of the case.

LORD ELLENBOROUGH C. J. It is a decisive objection to the first count that it charges a contempt by six persons of an order, which is only stated to have been served on *four* of them (for the fifth person, on whom it was served, is not included in the indictment.) There must be personal service of the order on all the persons who are charged with a contempt of it. A similar objection is admitted to run through all the counts.

GROSE J. concurred.

LAWRENCE J. The indictment is for a disobedience and contempt of an order of sessions, which order is only stated to have been served on five persons ; those alone therefore could be guilty of a contempt of it : and yet the contempt is charged in every count upon others than those.

LE BLANC J. The first count does not state that the six persons, whom it charges with the contempt of the order of sessions, had ever been served with it ; but it only states service of the order on five persons by name, and others whom it does not name, four of whom named, omitting *Russel*, are included in the charge. This is attempted to be supplied by stating that at a meeting of the commissioners, at which those four and the two *Bacons* were present, a demand was made of the money on all the six, which they refused to pay, or to give an order for the payment of it : but it is no where alleged that the two *Bacons*, charged also in that count, had been served with the order. The same objection is admitted to apply to all the counts.

Judgment for the Defendants.

1806.

The KING
against
KINGSTON
and Others.

[53]

1806.

Wednesday,
*Nov. 19th.**The KING against BRIDGES.*

One convicted upon the stat 9 & 10 *W. 3. c. 41. s. 2.* of having unlawfully in his possession, or concealing, the king's naval stores, cannot, since the stat. 39 & 40 *Geo. 3. c. 89. s. 2.* be sentenced to hard labour.

*[54]

THE defendant was brought up for judgment, after conviction on the stat. 9 and 10 *W. 3. c. 41. s. 2.* for unlawfully having in his possession the king's naval stores marked with the king's mark: and judgment was about to be pronounced that he should be imprisoned in the house of correction for the county of *Surry*, and there kept to hard labour for 3 calendar months, and be once during that time publicly whipped. This would have been warranted by the statute 17 *Geo. 2. c. 40. s. 10.* reciting the st. 9 & 10 *W. 3. c. 41.* and 9 *Geo. 1. c. 8.* But a doubt occurring how far the power of sentencing to hard * labour was taken away by the subsequent statute of the 39 & 40 *Geo. 3. c. 89. s. 2.* the Court upon further consideration, and comparing the different provisions of these statutes, were of opinion, that the power of sentencing to hard labour was taken away by the latter statute; and therefore pronounced judgment, that the defendant should be imprisoned in the house of correction for the county of *Surry* for three calendar months, and be once during that time publicly whipped.

Thursday,
*Nov. 20th.**IRVINE against ELNON.*

After the delivery of an award, the arbitrator cannot, though within the time limited by the submission, correct a mistake

in the calculation of figures, by making another award corresponding to the admitted proportions of a partnership fund.

Garrow

Garrow and *Marryat*, on shewing cause against a rule for setting aside the second award, cited *Henfree v. Bromley* (a), where Lord *Ellenborough* seemed to distinguish between a case like the present; where, as they contended, the alteration was merely intended to correct an error in the calculation of figures; and the case then before the Court; where the arbitrator, after having completed his award and delivered it out of his hands, had attempted to exercise a new act of judgment as to the costs of the reference, which he had not meant to include in his original award. But

1806.

IRVINE
against
ELNON.

Lord ELLENBOROUGH C. J. said, that what had been there observed by him was merely in answer to an argument urged at the bar: and that the result of his judgment then was, as it still continued to be, that the arbitrator's authority, having been once completely exercised pursuant to the terms of the reference, was at an end, and could not be revived again even for the purpose of correcting a mistaken calculation of figures; observing at the same time that such mistakes might include the essential merits of the case.

[55]

The Court was thereupon prepared to make the rule absolute, when it was suggested to Sir *F. Gibbs*, whose rule it was, that the effect of making it absolute would be to set up the original award, which was admitted on all hands to be erroneous in this respect. To obviate the inconvenience, therefore, it was agreed that both the awards should be set aside.

(a) 6 *East*, 311.BELL *against* SAUNDERSON.

Thursday,
Nov. 20th.

TO assumpsit for goods sold and delivered the defendant pleaded his discharge under the insolvent debtors' act of the 41 *Geo. 3. c. 70.* and the replication, admitting the discharge as to his person, prayed judgment against his goods; and the plaintiff obtained interlocutory judgment accordingly, as appears by s. 38, giving the plea of discharge, s. 4. in the terms of it but with reference to the subsequent provision.

The insolvent debtors' act of the 41 *Geo. 3. c. 70.* only discharges the person and not the effects of the debtor, includes both,

and

1806.

—
BELL
against
SAUNDER-
SON.
[56]

and executed a writ of inquiry; and after final judgment (which by mistake was entered up generally) issued a writ of fieri facias and levied his damages. And now *Espinasse*, in support of a rule nisi obtained by him on a former day for setting aside the judgment and execution, *for irregularity*, insisted that the 4th section of the act discharged not only the *person* but the *effects* of the defendant; enacting that every person within the relief of the act, “shall, as to his *person* and “*effects respectively*, be for ever released, discharged, and exonerated to such extent and in such manner as is hereinafter provided, and no otherwise.” But

The Court held that these latter words controlled the generality of the former; and as the only subsequent provision touching the discharge was in section 38, enabling defendants sued for existing debts to plead the statute in discharge of their *persons* alone from execution, that the interlocutory judgment was regular, and the execution such as was meant to be allowed by the act; though final judgment had been entered up generally by mistake. This, however, was no matter of *irregularity*: and therefore they discharged the rule which was obtained on that ground: but it was agreed to be referred to the master, to see whether more had been levied on the fieri facias than was due, and the costs to be in his discretion.

Littledale for the plaintiff.

1806.

Sir F. BARING and Others *against* DAY.

IN trover for a cargo of sugar and cotton, tried before *Thomson, B. at Winchester*, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case. In *May 1805*, the ship *John and William* sailed from *Surinam* bound for *London*, with the cargo in question, consigned to the plaintiffs, merchants in *London*; and having in the course of her voyage met with bad weather and parted all her cables, she was on the 23d of *October 1805*, about half past two in the morning, stranded at *Sowley Beach*, near *Lymington*, in the county of *Southampton*. Between 7 and 8 o'clock on the same morning, two pilots went on board, at whose recommendation the mate of the ship, who then had the command of her, (the master having gone on shore at *Stokesay* the evening before,) sent for an anchor and cable to the defendant, who lived at *Cowes*, in the *Isle of Wight*, and who was then a stranger to the master and owners; but before the anchor and cable arrived, which was not till the 24th at day light, the tide had forced in the head of the ship, and she had fallen upon her side, and had five feet water in her hold. The anchor and cable were of no service when they arrived; and the situation of the ship becoming more urgent, the mate, who still had the command of her, sent to the defendant to send all the help which was necessary; and he accordingly sent several small vessels with men to their assistance. But before any of the cargo was removed, (but whether before or after the * arrival of any of these vessels was not exactly ascertained,) a custom-house officer from *Lymington* came on board, who was accompanied or followed by other custom-house officers, one or other of whom remained on board during the whole time that the cargo was unloading. And as the goods were carried off in the vessels furnished by the defendant, the mate of the ship and a custom-house officer took an account of them, and a custom-house officer went to and fro with each boat. The cargo was in this manner unshipped in about a week after the stranding, and was carried to *Cowes*, where it was lodged in the defendant's warehouses, under the

of salvage by the award of three justices of peace; which statute only applies to cases where application is made by the owners, &c. to certain public officers named, and the salvage is made under their orders.

Friday,
Nov. 21st.

The command of a stranded vessel having by the recommendation of the pilot who came to his assistance sent to the defendant on shore, till then a stranger to him, to send all the help which was necessary, which he accordingly did; and under his direction (but also under the inspection of custom-house officers attending) the goods were brought on shore and housed under the joint locks of himself and the collector of the customs; and he paid all the salvors: held that this constituted him the agent of the owners, and took the case out of the stat.

12 Ann. st. 2.
c. 18. s. 2. for
regulating
the quantum

1806.
 ———
 BARING
 against
 DAY.

[59]

joint locks of the defendant and of the collector of the customs of that port, as is always done when foreign goods subject to duties are brought into port, and also in the case of wrecked and stranded goods. The custom-house fees and charges were paid by the defendant, including the demands of such of the custom-house officers as assisted at the wreck in saving and taking care of the goods, and of others of them who attended at the defendant's warehouses where they were stowed; all which payments were charged by the defendant in the account afterwards delivered in by him to the plaintiffs, and which account was afterwards submitted by the plaintiffs to the magistrates, and upon which they made their award as after mentioned. During the saving and stowing away of the goods the defendant also, at the request of the master, advanced to him 300*l.* to pay seamen's wages; which sum of 300*l.* was soon after repaid by the master, and forms no part of the defendant's claim to retain in this action. The plaintiffs afterwards sent an authorized agent to *Cowes* to settle the amount of the salvage, and to reship the goods for the port of *London*, their original destination; having petitioned the board of customs for that purpose. The plaintiff's agent accordingly applied to the defendant for an account of the expences of the salvage; who delivered in a bill amounting to 1,816*l.* 16*s.* 2*d.* (not including the 300*l.* before mentioned to have been repaid to him,) with which the plaintiffs being dissatisfied, they refused to pay it, and signified to the defendant and to the collector of the customs their intention of applying to the magistrates to settle the amount of the salvage pursuant to the act of parliament. On the 24th of *October* the master, who had then heard of the disaster which had befallen the ship, went also to *Cowes* to the defendant, from whom he learnt what measures had been taken, which he approved; and soon afterwards went to the ship, where he found the persons whom the defendant had sent employed in getting out the cargo, of which they had the management; and he consulted with the defendant what was best to be done. The collector of the customs at *Cowes*, or any officer under his controul, did not go on board the ship; nor was the place where she was stranded within his district, but within the port of *Southampton*, of which port *Lympington* is a member. Early in *December* 1805, the defendant applied to the collector of the customs at *Cowes*, and inquired if he had any directions from the Board for the re-

shipping

shipping of the cargo in question for the port of *London*; to which he answered, as the fact was, that he had received the leave of the Board conditionally, that the salvors should be first satisfied what they were entitled to have, and that the crown should be put to no expence on account of it. The defendant then said that the owners refused to pay his demand, and wished to refer it to the adjudication of the magistrates, to which he would not consent. The collector said, that as the plaintiffs objected to the defendant's charges, he (the collector) could not agree to them, and the matter must go to the adjudication of the neighbouring magistrates. And the collector also informed the plaintiffs' agent that till they could agree with the salvors, or the matter was settled by the magistrates, he could not suffer the plaintiffs to reship their goods. Soon after, upon the application of the plaintiffs the collector nominated two neighbouring justices of the peace, and the plaintiffs a third, (of which notice was given to the defendant,) for the purpose of adjusting the quantum of the monies and gratuities to be paid to the defendant and the several other persons who had acted in the salvage of the said cargo. And the said justices afterwards appointed the 2d of *Jan.* 1806, for the hearing and adjudication of the said matters; of which the defendant had notice, but did not attend; whereupon the magistrates adjourned to a subsequent day, of which the defendant had also notice; and he not then attending, the magistrates examined the said matters, and every charge made by the defendant in his bill delivered, and heard the witnesses, and made their adjudication and award as follows: "*Isle of Wight*, county of *Southampton*. Whereas in order to settle and adjust the quantum of monies or gratuities to be paid to the several persons who acted and were employed in saving and preserving the cargo and materials of the ship *John and William*, *J. P.* master, bound from *Surinam* to *London*, laden, &c. stranded on *Sowley Beach*, between *Leap* and *Lymington*, in the said county, on the 23d of *October* 1805, a meeting of us, the Rev. Sir *H. W. Holmes*, Bart., *J. D.* Esq. and Rev. *J. W.* clerk, three neighbouring justices of the peace, was on the day and year hereunder written, duly had, at *Newport*, &c. pursuant to notice to us for that purpose given, as well by the said master and merchants whose goods were on board, as also by *J. W.* Esq. collector of the customs of the port of *Coventry*, in the said *Isle*;

1806.

 BARING
against
DAY.

[60]

[61]

1806.

BARING
against
DAY.

Isle: Now know ye, that we the said justices, having fully considered the particulars of the claims, charges and demands, charged to be paid and expended by and due to the said several persons respectively, and contained in the first column of the account hereunto annexed, amounting in the whole to 1816*l.* 16*s.* 2*d.* do hereby in pursuance of the statute in that case made, and the power to us hereby given, declare that the said several persons are in our judgment respectively entitled to the several and respective sums of money contained in the second column of the said annexed account, amounting in the whole to 714*l.* 19*s.* 4*d.*, and that the same is justly due to them: and therefore we the said justices do hereby settle, adjudge and determine that the said several and respective sums of money contained in the second column of the said annexed account are justly due and payable to the said several persons respectively, clear of all deductions, for their trouble and assistance in saving and preserving the said cargo and materials; and the said quantum of the monies or gratuities for salvage of the said cargo and materials to the said several persons are hereby settled and adjusted at the said sum of 714*l.* 19*s.* 4*d.* In testimony whereof, we the said justices, as well at the request of the said masters and merchants as of the said *J. W.*, have to this our adjudication or adjustment set our hands and seals the 4th of *January* 1806." (Signed and sealed by the three justices.) A copy of this adjudication and award was afterwards served upon the defendant; and the plaintiffs' agent at the same time tendered to the defendant the 714*l.* 19*s.* 4*d.* as directed by the magistrates, and demanded the cargo. The defendant refused to accept the money tendered: contending, as he had all along done, that the case was not within either of the acts of parliament which give the magistrates jurisdiction; and now detains the cargo, though the collector of the customs is ready and willing to deliver up the same to the plaintiffs. Supposing the case not to be within the statutes, the sum awarded and tendered has by an arbitrator to whom that point has been referred been found to be insufficient by 274*l.* 11*s.* 9½*d.* The question for the opinion of the Court was, whether such adjudication and award of the magistrates were conclusive upon the defendant? If it were, then a verdict entered for the plaintiffs was to stand; if not, then a nonsuit was to be entered.

East, for the plaintiffs, contended that this was a case within

1806.

 BARING
 against
 DAY.

within the stat. 12 *Ann. st. 2. c. 18.* whether or not the defendant were to be considered as an agent employed by the owners in the salvage. The mischiefs recited in the act, that stranded ships near home have been plundered and their cargoes embezzled, and when any part has been saved, it has been swallowed up by exorbitant demands for salvage, apply as well to agents as to strangers; and so necessary and just an act ought to be construed most beneficially to repress the mischief and advance the remedy. The 1st section is merely directory to sheriffs, justices of peace, custom-house officers, and other public officers named, upon application made to them on behalf of wrecked or stranded vessels, to command the constables of the several ports nearest to the sea-coast to procure assistance; and particularly to command the assistance of the superior officer of any man of war, or merchant vessel at anchor near the place; upon which latter a penalty of 100*l.* is imposed in case of refusal or neglect. But the subsequent provisions of the act are independent of, and more extensive than, the first clause. For by the 2d section, “for the encouragement of *such persons* as shall give their assistance,” which includes *voluntary* assistance given by any person, whether commanded or not by any of the officers named in the first section; it is enacted, “that the said collectors of the customs, &c. and all others who shall act or be employed” in the salvage, shall, within 30 days after, be paid a *reasonable reward* by the owners, &c. of the distressed vessel. Nothing can be more general than the description of *all others* who shall *act or be employed*: and the latter words seem in terms to include the owner’s agents as well as others. The reward is to be *reasonable*. This was meant to exclude all hard bargains extorted by those who offer their assistance under the pressure of the owners distress. If the express or implied employment of an agent, (and at most the defendant’s case only amounts to an implied agency) take the case out of the act, it will in most instances be a dead letter; for then every call for assistance to individuals at hand, however urgent the necessity, will be an implied employment. And this case is no more; for the defendant was a stranger at the time to the master and owners; and the recommendation of the pilots to send to him was merely because, from the nature of his dealing, he was most likely to afford the speediest assistance in boats, cables, &c. Besides, if no case of salvage be within the act, except, upon applica-
 tion

[63]

1806.

—
 BARING
 against
 DAY.
 [64]

tion to the public officers, the assistance be rendered under their orders, the mischief meant to be prevented will happen while search is making for them, instead of getting the readiest help: And the objection applies with still greater force to foreign ships, which were equally within the view of the legislature, the masters of which cannot be supposed to be cognizant of our laws, and cannot know where to send for such assistance. The 2d section then goes on to provide, in default of a reasonable reward paid by the owners to the salvors, that "the vessel or goods so saved shall remain in the custody of such officer of the customs, &c. until all charges shall be paid, and until the said officer of the customs, &c. *and all others so employed as aforesaid shall be reasonably gratified, or security given to the satisfaction of the parties who are to receive the same.*" The custom-house officer is hereby appointed a trustee for the salvors, as well as for the crown: and therefore the vessel or goods are to remain as a pledge in his custody until all the charges shall be paid, and every person employed in the salvage is reasonably gratified, or security given (not to *his* but) to *their* satisfaction. The legislature could never have intended, when they meant to give a boon to persons in distress, that their property should be kept in pledge for one set of salvors, while another set was suing them at law. Then the act provides that in case the owner, &c. whose property is saved, "*shall disagree with the said officer of the customs touching the monies deserved by any of the persons so employed as aforesaid, it shall be lawful for the owner, &c. and the said officer of the customs to nominate three of the neighbouring justices of peace, who shall thereupon adjust the quantum of the monies or gratuities to be paid to the several persons acting or being employed in the salvage, &c.; which adjustment shall be binding to all parties.*" The nomination of the justices is to be made by the owners on the one part, and the custom-house officer, as trustee for all the salvors, and having the pledge in his hands, on the other part. [Lord *Ellenborough* put the case that the officer might agree with the owners to give the salvors less than they deserved.] That would be a breach of his trust for which the officer would be answerable to the salvors either at law or in equity; but the court will not presume that he would so misconduct himself. He then referred to other sections (particularly s. 3 & 4.) of the act of *Anne*, and s. 13. of the stat. 26 *Geo. 2. c. 19.* as shewing that the Legislature looked

[65]

1806.

 BARING
against
 DAY.

looked to the owner's controul over the wrecked or stranded property continuing, notwithstanding the temporary custody of it confided for a particular purpose to the public officers; and therefore that the general provisions of the act were not confined to cases of compulsory assistance only. But he argued that if the employment of a particular salvor took the case out of the act, the owner would lose the benefit of all those protecting provisions which supposed a joint controul of the owner and the officers. This construction is strengthened by the stat. 26 *Geo. 2. c. 19.*; which, considering the case of salvors employed by the owners or by the public officers as provided for by the former act, extends the like provisions to those who act of their own accord, and therefore enacts (*s. 5.*) that in case any person *not employed by the owners, &c. or other persons lawfully authorized* in the salvage of any vessel, &c. shall *in the absence* of persons so *employed or authorized* save any ship, &c. he shall be entitled to a reasonable reward, to be adjusted in case of disagreement about the quantum *in like manner* as by stat. 12 *Anne, or else* in the manner therein-after prescribed. And then it proceeds (*s. 6.*) to extend the jurisdiction to other classes of persons of a lower description than justices of the peace; requiring however, that *five* of them should act in adjusting the salvage: and leaving it optional in the owners and in the collectors of customs to call in three justices of peace under the statute of *Anne*, or five of the commissioners authorized by the stat. 26 *Geo. 2.* to adjust the salvage, under the joint provisions of the two acts. He also argued that the circumstances of this case did not amount to a special employment of the defendant by the master or owners. The facts of strangers *sending for a cable and anchor*, (which however came too late,) and afterwards *sending to the defendant for all the help which was necessary*, were no more than calling for the nearest assistance at hand in the hour of extremity: and this was not carried further by the subsequent approbation of the captain after the goods were saved. The act of unloading the ship was after the officers had taken charge of her; and the goods were carried to the defendant's warehouses merely as to a convenient place of deposit, and not upon any special contract that they should be lodged there; and they were kept there under the lock of the officer as well as of the defendant.

[66]

1806.

—
BARING
against
DAY.

[67]

Gaselee, contra insisted that the employment of the defendant by the plaintiffs, in the salvage of the ship and cargo, took the case out of the statutes, and that no case was within them unless where the salvage was made by the orders and under the immediate control of the public officers named therein. The legislature never meant to deprive the owners and masters of ships in distress of the liberty of employing what agents they pleased to assist them; and therefore by the first section of the st. 12 *Ann* st. 2 c. 18. in order to give the public officers any jurisdiction to interfere, it must be "*upon application* made to them, or any of them, *by or on behalf of the chief officer*," of the vessel in distress; and therefore such public officers only are empowered to *command* the necessary assistance. But here no application was made for assistance to the public officers, but only to the defendant. All the subsequent clauses of the act have reference to the first. The 2d section says that "*the SAID collectors of the customs*," &c. and all others who shall act or be employed in the preserving of any *such* ship or vessel in distress *as aforesaid*, &c. shall be paid a reasonable reward. It supposes that the ship had been taken possession of by the collector or his deputy, in consequence of an application made to him under the provisions of the act, and that it was to *remain* in his possession till the salvors were satisfied; for it uses the word *remain*. There was no necessity for enacting, that persons employed by the owners themselves, or their authorized servants, in the salvaga, should be paid a reasonable reward by the owners, &c.: Such a provision can only apply to persons employed by others in the same service. And the like observation applies to the other clauses of the act relating to the salvors. Again, the remedy given by the act to the salvors, in case of disagreement with the owners as to the amount of the reward, looks to the collector of the customs only, and those employed by him or acting under his authority. He and the owners name the justices who are to arbitrate between them; and no consideration is had of the interest of agents employed by the owners themselves, nor have they any voice in the nomination of the arbitrators. This construction is rather confirmed than shaken by the provisions of the st. 26 *Geo.* 2. c. 19. which by the very terms of the 5th clause, excludes the case of persons employed by the owners in the salvage, but extends the former provisions to persons voluntarily interfering to save the property;

property; which would not have been necessary if the construction contended for on the first act were well-founded, namely, that it extended to all persons *acting or being employed* in the salvage, whether under the direction of the public officers or not. And the 6th section, which extends the jurisdiction to arbitrate to other public officers, plainly refers to a salvage by *their care or direction*; as do all the other provisions of the same statute. He then argued that the custom-house officers only went on board and inspected the landing of the goods, with a view to secure the king's duties, and not for the purpose of salvage under the acts of parliament. And he also observed that the collector of the customs at *Cowes* never was on board at all: nor was *Cowes* the *nearest* port to the place where the vessel was stranded. [The Court, however, laid no stress on this latter circumstance.]

1806.

 BARING
against
 DAY.

East, in reply, observed principally that the 5th section of the 26 G. 2. did not provide generally for the remuneration of salvors not employed by the owners, &c. but for such persons *in the absence of persons so employed by the owners or authorized by the public officers*; considering the cases of persons employed by the owners or public officers or other assisting in the presence of any such, as sufficiently provided for by the former act: and it carries the provision further, by entitling the discoverers of concealed effects taken from the stranded vessel to a reward. The Court, he said, would presume that the officers of the customs went on board for the purpose of exercising all the duties cast on them by the legislature, as well for the benefit of the owners of the stranded property as for the crown.

LORD ELLENBOROUGH C. J. The circumstances disclosed in this case fall in so much with the experience we have had on other occasions of the extravagant demands made and extortions often practised by persons employed by the owners in the salvage of vessels and cargoes, and the construction of the acts contended for on the part of the plaintiffs if so much in unison with our wishes to extend the remedy given by them, as far as we are authorized, to cases of this kind falling alike within the mischiefs recited, that one's judgment is apt at first to be warped in endeavouring to generalize the language of the act, so as to make it comprehend a case which on an accurate view does not appear to be within it. The public, however, are much in-

[69]

1806.

—
 BARING
 against
 DAY.

[70]

debted to the plaintiffs for bringing forward the consideration of the question, in order that the attention of the legislature may be drawn to it, and such remedy be applied as may meet the mischiefs disclosed to us in their full extent. But on looking into the enacting clauses, it is much to be lamented that the legislature has made no provision for a case like the present : it has only provided for cases where application is made by or on behalf of the commander of any vessel in distress to certain public officers, and where the salvage is made through them and others employed by them. Such officers alone are authorized to command the assistance of ships of war and others at anchor near the place. But it has omitted to provide for the case of persons employed in the salvage by the owners where resort has not been had to the public officers named. This is a case of the latter description, where the mate sent on shore to the defendant for assistance, without adverting at all to the acts of parliament, which were not in his contemplation at the time : nor does the course which was pursued square with and of the provisions of them. I should have been well pleased to have considered the first section of the statute of *Anne* to be merely directory, as it contended to be : but on reading the second clause, which gives the justices power to arbitrate and adjust the quantum of salvage between the master of the vessel, or owner, on the one part, and the officer of the customs on the other, looking to these only as the litigant parties, there are words of reference which connect and incorporate it with the first clause ; for it does not merely say, “ for the encouragement of such as shall give their assistance to *such* vessels so in distress as *aforesaid*,” and refer to “ the *said* collector of the customs,” &c. words which of themselves might not necessarily incorporate the two clauses ; but it goes on to state that in default of a reasonable reward paid to the salvors within 30 days after the service performed “ the ship or goods so saved as *aforesaid* shall *remain* in the custody of such officer of the customs,” &c. until satisfaction made. This must refer to the same custody of the property directed to be taken by the public officers under the first section of the act, and cannot admit of any other signification. That, therefore, narrows the mode chalked out by the 2d clause for ascertaining the quantum of compensation, if disputed, to the single case of a previous application on the part of the master or owners to the public officers
 named

named in the first clause, amongst whom are the officers of the customs, in whose custody the ship and cargo are ordered to *remain*; and it excludes the case of a voluntary employment of their own agents by the master or owners; the property * in that case remaining exclusively in their own custody. The act of *George 2d* applies to the case of persons volunteering their assistance to save the property under no employment or requisition whatever, either by the owners or the public officers. It was proper to hold out encouragement to all persons to give help to vessels in distress: and their encouragement for saving the ship and goods is the same as was before given in the other cases provided for; and the quantum, in case of disagreement, is to be adjusted by the magistrates or other commissioners named. But the legislature have unfortunately omitted to extend the remedy to a third and most important class of persons, who are most usually employed on such occasions, namely, persons who, like the defendant, have the readiest means at hand of affording assistance, and who are commonly recommended to them, as in this instance, by the pilots, who first come out to a ship in distress; and in consequence of such recommendations they fall into the hands of these persons; and their property, instead of being wrecked and destroyed by the perils of the sea, is swallowed up on shore by exorbitant demands for salvage. It is therefore extremely fit that the attention of the legislature should be drawn to this great evil, and that provision should be made against it by including in the remedy all cases of salvage: making the first clause of the statute of *Anne* merely directory; but giving resort in all cases to the domestic jurisdiction, to save the unfortunate owners from the pillage of those whom their necessity leads them unwarily to employ in the salvage. It seems to me, therefore, that the award of the magistrates is not binding on the defendant, and that he is entitled to the larger sum given to him by the arbitrator, which, however, is little more than a moiety of his original demand.

GROSE J. Whether or not the adjudication of the magistrates be conclusive must depend upon the manner in which the one party employed the other, and that other consented to be employed in the salvage: if it were under the act, the award is conclusive: if upon a contract between the owners and person employed, it is otherwise. Now here the contracting parties had no idea at the time that they were acting under the

1806.

—
BARING
against
DAY.

*[71]

[72]

1806.

—
 BARING
against
 DAY.

statute : Those on board never applied to any public officer for the assistance directed by the act, which they were bound to have given : but the recurrence to the act, when the dispute about the salvage arose, was plainly an after-thought. The first step taken at the time was to send from the ship to the defendant for an anchor and cable : Had these arrived soon after, it is probable that the necessity of further assistance would have been superseded. But the situation of the ship growing worse, the mate afterwards sent to the defendant for all the help that was necessary. Still the act of parliament was never thought of : but the defendant was sent to, as any other agent might be, for assistance. On the other hand the defendant, without attending to the directions of the act, by giving notice to the public officers, and taking his orders from them, voluntarily at the request of the mate, sent his own vessels and men to the assistance of the ship, unloaded it, and lodged the cargo in his own warehouses on shore. In the mean time indeed the custom-house officers had gone on board, and they took an account of the cargo, and the collector put his lock also upon the warehouses ; but all this was done by them to secure the king's duties. The salvage then was made not by the public officers acting upon the application of the master, and under the authority of the statute ; nor by the defendant acting under them ; but by the defendant acting under the employment of the master as a person employed to give assistance for a reasonable compensation. That takes the case out of the statute ; and though I am sorry for the consequence, yet I can find nothing which authorizes us so say that this case ranges itself under the statute. The defendant is therefore entitled to receive the compensation awarded to him by the arbitrator, to whom the matter was referred at the trial ; which is at any rate considerably less than his original demand, the payment of which was properly resisted ; and less than that having been tendered, there must be judgment of Nonsuit.

[73]

LAWRENCE J. I agree that the case is not within either of the acts of parliament referred to. The object of these laws was to provide assistance to ships in distress from those who, from their local situation as public officers near the coast, were best able to give it. For this purpose the statute of *Anne* requires of them, upon application of the chief officer of the vessel in distress, that leaving for the time all other duties, they should give present assistance to those who are in immediate need of it;

and

1806. -

 BARING
against
 DAY.

[74]

and they are empowered to command the assistance of others for the same purpose. It was reasonable therefore, that these persons, whose services were thus compelled to be given, should have a reasonable gratification secured to them by the same law. And in ascertaining how this was to be done in case of disagreement with the owners by whom it was to be paid, it is not immaterial to consider who are the contending parties contemplated by the legislature, and for whom the provision made is adapted; these are the owners on the one hand, and the collector of the customs on the other, in whose custody the property saved is directed by the second clause to remain, and who is charged to take care of the interests of those employed in the salvage under the direction of the public officers. There was another class of persons for whom the legislature afterwards made provision, and these are volunteers bringing in from sea vessels in distress, who were deserving of encouragement. These also, are by the act of *Geo. 2.*, in case of disagreement with the owners as to the quantum of salvage, to have the same security upon the property in the hands of the collector of the customs, and their compensation is to be adjusted and paid in the same manner as is provided by the former statute. It is difficult indeed to understand how such a provision, which was properly enough adapted to persons employed by the public officers in the salvage under the first act, came to be applied to volunteers under the second act, who had no privity with the collector of the customs; except by supposing that the provision for the latter arose out of, and followed the enactment of the first act, which had before placed the property saved in the hands of the collector, for the benefit of all those whose services it compelled, and of those who were employed by them. And therefore I take it, that when the first act passed, the legislature looked only to the persons between whom the contract for salvage was to be made, namely, the owners on the one hand, and the public officers and those employed by them on the other; it therefore provided only for the compensation of the latter, and for the means of adjusting that compensation in case of dispute. And the second act was only intended to enlarge the provisions of the first, by providing the same remedy for volunteers acting in the salvage without any authority, as had been before provided for those whose services were compelled, and others employed under them; but still it did not include persons who were employed by the master or

[75]

1806:

—
 BARING
against
 DAY.

owners themselves. It seems, however, from the different wording of the act of *Geo. 2.* (though I have not sufficiently considered it with that view, nor is it necessary for the present purpose) as if it meant to empower the officers therein named to assemble and give assistance to the vessel in distress without being called upon by the parties interested (*a*). I concur entirely with what my Lord has said respecting the necessity of some legislative provision to meet cases like the present. It often signifies little to the owners whether their property be lost by wreck, or by the plunder of the salvors whom they employ. I think, therefore, that persons of this description, though employed by the owners in the salvage, should only be entitled to such remuneration as the magistrates, &c. shall think proper; perhaps not conclusively, but with the liberty in certain cases to refer their claims to the Court of admiralty, or to the courts of law.

[76]

LE BLANC J. The plaintiffs cannot maintain this action because they did not proceed under the act of parliament in procuring the salvage to be made; and therefore the tribunal resorted to for the purpose of settling the amount of it had not competent authority to form the judgment which they pronounced. The legislature in the statute of *Anne* did not contemplate the case of a master or owner employing his own agent in the salvage; not foreseeing that cases would arise in modern times wherein merchants would require as much protection from agents employed by themselves as from others. All the provisions of the act look only to persons employed in the salvage through the medium of the public officers. The property saved is placed in the custody of the collector of the customs for the benefit of those acting under him; and in case of disagreement the magistrates are to be named by him and the owners; considering those as the only parties interested. In this case the officers took upon themselves no part of the salvage, except so far as was necessary to secure the duties due to the crown. Some of them continued, indeed, on board while the cargo was un-

(*a*) The 6th section of the st. 26 *Geo. 3. c. 19.* empowering the magistrates, &c. nearest to the place where any ship, &c. shall be stranded, *forthwith* to give public notice of a meeting of the officers therein named, who are required to give aid in execution of this and the former act, and to employ proper persons for the saving of ships in distress, &c. omits the words "upon application made to them, or any of them, by or on the behalf of any commander or chief officer of any ship, &c. in danger of being stranded," &c. which are to be found in the corresponding clause of the statute of *Anne*.

lading,

lading, and others saw the goods landed and wharehoused ; but that was in the ordinary exercise of their official duty, to prevent any of the goods being run on shore clandestinely. But all the salvors were paid by the defendant as the agent for the owners. The case, therefore, is not within the statute of *Anne*. Then the act of *Geo. 2.* was for the encouragement of persons who happening to find ships deserted at sea, or goods cast on shore, should bring them into port, and place them in safe Custody, though not employed by any person so to do : and it provides for them the same reasonable satisfaction as under the former statute, to be adjusted, in case of disagreement about the quantum, in like manner as the salvage is to be adjusted and paid by virtue of that statute. Now it might be a doubt whether that meant, that in case of disagreement it should be settled through the medium of the *same litigant parties* as under the former statute, namely *by the collector of the customs* on the one side and the owners on the other, or by the owners on the one side, and the party who had volunteered his services to save the wreck on the other side : such volunteers, within the statute of *Geo. 2.* not having been employed under the authority of the collector or other public officers, as the salvors provided for by the statute of *Anne*, and therefore having a distinct interest of their own ; and the disagreement to be adjusted being between those volunteers and the owners ; and not, as under the former statute, between the latter and the collector of the customs. However, it is not necessary at present to give any opinion on that point : it is sufficient to say, that at any rate this is not a case within either of the statutes.

A nonsuit to be entered,

1806.

BARING
against
DAY.

[77]

The KING *against* The Inhabitants of BASTELL
CAREINION.

Saturday,
Nov. 22d.

TWO justices by an order, removed *Gainor Price*, the wife of *Owen Price*, (therein stated to have been convicted of felony, and committed to *Cardigan gaol*,) and their children, by the party interested in a witness' testimony, who was objected to on account of having been convicted for felony, and his imprisonment being unexpired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself.

name,

1806.

The KING
against
The Inhabi-
tants of
CASTELL
CAREINION
[78]

name, from *Aberystwith*, in the county of *Cardigan*, to *Castell Careinion*, in the county of *Montgomery* : against which order the latter appealed ; and on hearing of the appeal at the sessions it was proposed by the respondents to examine the said *Owen Price*, (then being present in court in the custody of the gaoler,) to prove that he had gained a settlement in the appellant's parish by renting a tenement of the annual value of 10*l.* and residing on part thereof, in the said parish, for more than 40 days. It appeared by the evidence of *Owen Price*, and also of the gaoler, that *Owen Price* was at the preceding great sessions at *Cardigan* on the 26th of *March* 1806, convicted of grand larceny ; but *the record of such conviction* was not produced on the trial of the appeal nor a copy thereof ; and that on such conviction he prayed the benefit of the statute, and the same was allowed to him. And that the court of great sessions ordered him, for his said offence, to be kept and detained in the common gaol of the said county for 12 calendar months. The sessions were thereupon of opinion, that by reason of the said conviction, and until the expiration of his imprisonment, *Owen Price* was not a competent witness, and refused to allow the respondents to examine him concerning his settlement. The respondents then applied to the court to respite the further hearing of the appeal ; which they refused ; and quashed the order of removal, subject to the opinion of B. R. on the foreign statement.

Abbot and Peake, in support of the order of sessions, said that, the question in this case was not whether the witness were bound to have answered the question, as to his own conviction ; but whether it were not competent to him, no objection being made by himself, to admit the fact of his conviction ; especially in a case affecting his own settlement.

[79]

Lord ELLENBOROUGH C. J. We must take it upon this case, that the evidence was objected to at the sessions by the party interested in repelling it, and there cannot be the least doubt that the objection was well founded. The evidence went to affect the rights of third persons, namely the litigant parishes ; for the pauper himself is no party to the cause in court. Whether or not the witness were convicted of the felony would appear by the record ; and it cannot be seriously argued that a record can be proved by the admission of any witness. He may have mistaken what passed in court, and may have been ordered on his knees for a misdemeanor : This can only be known by the record :

cord: and there is no authority for admitting parol evidence of it.

LAWRENCE J. The books are uniform in requiring the production of the record to prove a witness convicted of an offence. 2 *Hawk. ch.* 46. s. 20. 3 *Com. Dig. Evidence*, 280. 5 *Com. Dig. Testmoigne*, 516. *Bull N. P.* 292.

The other judges concurring,

Order of Sessions quashed.

Touchet was to have argued against it:

1806.

The KING
against
The Inhabitants of
CASTELL
CAREINION

GALE and Others *against* REED.

THIS was an action of covenant, brought by the three plaintiffs against their late partner *Reed*, for breaches of a covenant contained in an indenture, confirming and carrying into further effect a prior indenture made between them for the dissolution of their partnership; and which indenture made the 31st of

[80]
Tuesday,
Nov. 25th.

By indenture between A. and B., and C. dissolving their partnership, as rope-makers, A. and B. covenanted

to allow C. during his life, 2s. on every cwt. of cordage which they should make on the recommendation of C. for any of his friends and connexions, and whose debts should turn out to be good: and that A. and B. should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C's connexions whom they should be disinclined to trust. And C. covenanted not to carry on the business of a rope-maker during his life (except on government contracts;) and that all debts contracted or to be contracted in his or their names pursuant to the indenture, should be the exclusive property of A. and B.; and that C. should, during his life, exclusively employ A. and B., and no other person, to make all the cordage ordered of him, by or for his friends and connexions, on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever. Held

1st. That the covenant by C. to employ A. and B. exclusively to make cordage for his friends, and not to employ any other, &c. A. and B. not being obliged to work for any other than such as they chose to trust, was not illegal and void as being in restraint of trade without adequate consideration; for the whole indenture must be construed together, according to the apparent reasonable intent of the parties; and the general object being only to appropriate to A. and B. so much of C.'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and C. was still at liberty to work for any of his friends who were refused to be trusted by A. and B.: by which construction the restraint on C. was only co-extensive; as in reason it could only be intended to be, with the benefit to A. and B.; and therefore the restraint on C. could be no prejudice to public trade.

2. That breaches assigned generally against C. for having made cordage for divers persons other than for government, and for employing other persons than A. and B. to make cordage for his friends, &c. were well assigned; though no particular persons were named, nor the quantities or kinds of cordage mentioned, &c.; such facts lying more particularly within C.'s knowledge.

January

1806.

—
GALE
against
REED.

[81]

January 1804, whereupon the breaches are assigned, is as follows: "Whereas the said parties have further agreed to confirm the said deed of the 10th of *January* instant, so far as it relates to the dissolution of the said copartnership, and the mutual releases therein contained: and in all other respects to declare the said deed of the 10th of *January* instant, void, and of no effect: and they have also mutually agreed to enter into such covenants respectively as are hereinafter expressed and contained: Now this indenture witnesseth that, in pursuance and performance of the said agreement, they, the said *E. Gale* the elder, *E. Gale* the younger, and *J. Gale*, and the said *S. Reed* have mutually dissolved, and by these presents do dissolve their said copartnership, and do declare that the same shall from henceforth cease and determine to all intents and purposes whatsoever. And this indenture further witnesseth, that in further performance of the said agreement, the plaintiffs, for themselves, their heirs, executors, &c. covenant with the defendant, his executors, &c. that they the plaintiffs, shall *from time to time and at all times hereafter*, during the natural life of the defendant, pay, and allow to him and his assigns 2s. on every 100 weight of cordage, which, from the 14th of *December* last, shall appear to have been *made* by them the plaintiffs, *on the recommendation of the defendant*, and delivered to any person or persons whomsoever, who are or may be of the number of his particular *friends and connexions*, and *whose debts shall turn out to be good*. And further, that they, the plaintiffs, shall bear all losses which may happen by means of any of the debts which may be contracted with any of the said persons, the particular friends and connexions of the defendant: provided that nothing herein contained shall extend to the removing the liability of the defendant as an owner of any ship which may be supplied *with cordage or other things* by the plaintiffs to pay their bills for the same, or to the *compelling* the plaintiffs to furnish any cordage or other goods to any connexions of the defendant, whom they shall be *disinclined to trust or give credit to*. And the defendant doth hereby for himself, his heirs, executors, &c. covenant with the plaintiffs, their executors, &c. in manner following, viz. That he, the defendant, shall not in his life-time carry on the business of a rope-maker, or make cordage for any person or persons whomsoever (*except any contract which the defendant may hereafter enter into to make cordage, new or old, or any other articles, for government, or any public board,*

[82]

and

1806.

 GALE
 against
 REED.

and which he shall have free liberty, from time to time, to execute and complete.) And the defendant doth further covenant with the plaintiffs, that *all the debts due, and to become due, for cordage or other things sold or to be sold, whether in the firm of Gale, Reed, and Gales; E. Gale and Company; or in the name of the defendant, pursuant to any engagements contained in any preceding contract or covenant entered into between them the said parties hereto pursuant to the terms of this present indenture, are and shall be the exclusive property of the plaintiffs, their executors, &c.* And that the defendant, his executors, &c. shall not at any time or times hereafter, willingly do or suffer any act or thing to hinder or disturb the plaintiffs, their executors, &c. in obtaining the said debts, or any of them. But in case any of such debts shall at any time or times hereafter be received by the defendant, he shall immediately on such receipt, from time to time, *pay over* the same to the plaintiffs, their executors, &c. without any deduction whatsoever. And further that the plaintiffs shall, and lawfully may, use and keep possession of the rope-walk belonging to the defendant, situate at *King David's Fort* aforesaid, with the fixtures, utensils, and appurtenances thereto belonging, until the 31st of *May* now next ensuing, without any hindrance or interruption from or by the defendant, his executors, &c. And lastly, that the defendant shall, during his life, *contine to employ exclusively* the plaintiffs, to make all the cordage which may be ordered of him *by or for the particular friends and connexions* of the defendant *on the terms aforesaid*, and *shall not employ any other person or persons whomsoever to make any other cordage*, or any part thereof under any pretence whatsoever. The breaches assigned were, 1st, That after the making of the indenture the defendant carried on the business of a rope-maker, and *made cordage for divers and very many persons other than by virtue of any contract* which the defendant had entered into *after the making of the said indenture, to make cordage, &c. for government*, contrary to his covenant. And 2dly, That the defendant, after the making of the indenture, did not nor would (though often required) *employ the plaintiffs to make all or any part of the said last mentioned cordage according to the indenture*, but neglected so to do, and *employed divers other persons* to make the said last-mentioned cordage; although the plaintiffs were ready and willing to make the same on the terms in the indenture mentioned; contrary to the said indenture, &c. To the declaration assigning these breaches, *in making cordage for others, and employing others*

to

[83]

1806.

GALE
against
REED.

[84]

to make cordage, the defendant, after enrolling the indenture at large, demurred to the first breach ; assigning for cause, “ that the plaintiffs had not shewn or disclosed any, and what particular person or persons for whom the defendant made cordage, or any and what *particular quantities or kinds* of cordage the defendant did so make for them ; nor in *what manner* or by *what acts* he carried on the said business of a rope-maker, as is alleged in that breach of covenant. And he demurred also to the second breach ; assigning for cause, that the plaintiffs have not shewn or disclosed by *what particular friends and connexions* the quantities of cordage mentioned in that breach were ordered ; or shewn or disclosed any and what *particular quantities or kinds* of cordage were so ordered by them, or any and what *particular persons* were employed by the defendant to make such cordage. Concluding with the general allegations of insufficiency.

This case was argued in *Trinity* term last by *Holroyd*, in support of the demurrer, and *Lawes* contrà. The questions turned, 1st, on the construction of the particular covenants, whether illegal and void, as being in particular restraint of trade, without adequate consideration ; 2dly, upon the general manner of assigning the breaches. The general question has been discussed so often and so much at large in other reported cases ; and the Court, in giving judgment, went so fully into the application of the general principle to the particular covenants in question, that it is unnecessary to repeat the arguments. The cases cited on the general principle were *Mitchell v. Reynolds*, 1 *Pr. Wms.* 181. which collects all the antecedent authorities, and Mr. *Coxe's* notes supplies others. *Garrick v. Barry*, cited in *Shubrick v. Salmond*, 3 *Burr.* 1639. *Chesman v. Rainby*, 2 *Stra.* 739. *Clerke v. Comer*, *Rep. temp. Hardw.* 53. 7 *Mod.* 290. and *Davis v. Mason*, 5 *Term Rep.* 118. (and *vi. Bunn v. Grey*, 4 *East*, 190.) And in respect to the special causes of demurrer were cited *P. Anson v. Stuart*, 1 *Term Rep.* 748. *Farrow v. Chevalier*, 1 *Salk.* 139. and *Barton v. Webbe*, 8 *Term Rep.* 459. The case stood over for consideration till this term, when

[85]

Lord ELLENBOROUGH C. J. delivered the opinion of the Court. After stating the pleadings as above—It has been contended, on the part of the defendant, that the covenant on which the breaches have been assigned is void, as being a contract made in *particular restraint of trade, without adequate consideration to the party restrained*; upon the authority of *Mitchell v. Reynolds*, 1 *P. Wms.* 181. and other cases. And also that the breaches

breaches are ill assigned in point of form, inasmuch as the "*divers other persons*" alleged to have been employed to make cordage for the defendant, (as complained of in those breaches,) are generally so described, without mentioning them particularly by their names, or stating the kinds and quantities of cordage made, &c., as the defendant's counsel contended ought to have been done. As to this objection of form, and which is the cause specially assigned for demurrer, the answer given to it by the plaintiff's counsel, viz. that as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be presumed conversant of his own dealings, than of the plaintiffs, there was no occasion to state them with more particularity; is in our opinion a sufficient answer in point of law. What is laid down to this effect in *Robt. Bradshaw's* case, 9 Co. 61. and *Cro. Jac.* 304. and in several later cases, which are all collected in the case of *Barton v. Webbe*, 8 Term Rep. 459. and in a note of my brother *Williams* to the case of *Lord Arlington v. Meyricke*, 2 Sand. 411. has settled the law on this point; in opposition to the case of *Jones v. Williams*, Dougl. 214. which has been overruled in the two late cases of *Shum v. Farrington*, 1 Bos. & Pul. 640. and *Barton v. Webbe*, 3 Term Rep. 559.

Laying therefore this objection of form out of the case, it remains to be considered, whether the covenant in question be void, upon the ground already mentioned, viz. "as being a particular restraint of trade, without adequate consideration." The object and intention of the parties to this indenture appears to have been to devolve upon and exclusively to appropriate to the *Gales*, the plaintiffs, all the *beneficial private* trade of the defendant in this business of rope-making; leaving him at liberty to make and execute on his own account such contracts for cordage as he had made or might enter into with *government* or any of the *public boards*. The indenture uniformly contemplates this private trade as a trade carried on upon credit only. The only compensation which the indenture provides for the defendant, as the consideration for his restraint, and for the benefit to be derived to the plaintiffs in this respect, is a payment and an allowance of 2s. on every hundred weight of cordage, which, from the 14th of *December* preceding should appear to have been made by the plaintiffs on the recommendation of the defendant, and *delivered* to the order of his particular

1806.

 GALE
against
REED.

[86]

1806.

—
GALE
against
REED.

[87]

cular friends and connexions, *and whose debts should turn out to be good*: The plaintiffs agreeing to bear all losses which might happen by means of any of *the debts* which might be contracted with any of these particular friends and connexions of the defendant. But, as the plaintiffs were subjected to this eventual loss by *bad debts*, it was reasonable that they should be allowed to exercise their own discretion as to the persons to whom they should *give credit*. It is therefore accordingly provided by the indenture, “ that nothing therein contained should extend, or be construed to extend, to the “ compelling the said plaintiffs to furnish any cordage or other “ goods to any connexions of the defendant whom they might “ be disinclined to trust or give credit to.” The trade therefore which the indenture contemplates the plaintiffs are exclusively occupying is the furnishing of cordage for such of the defendant’s customers and friends as the plaintiffs should choose to trust: And the restraint on one side meant to be enforced should in reason be co-extensive only with the benefits meant to be enjoyed on the other. And as the carrying the restraint further would be arbitrary and useless as between these parties, a construction which would have that effect must be reluctantly resorted to, and not adopted at all if the general scope of the whole indenture will allow a different sense to be put upon the words of any particular covenant. The indenture does not in any part of it suppose or advert to any case of furnishing cordage, &c. to any connexions of the defendant, but upon trust or credit. It then provides that debts to become due for cordage, &c. sold in the joint names of them all, pursuant to the terms of that indenture, should be the *exclusive property* of the plaintiffs: That the defendant should do no act to hinder or disturb the plaintiffs in obtaining the *said debts*: but in case any of *such debts* should be received by him, that he should pay them over to the plaintiffs. After these provisions follows the covenant upon which the immediate question arises. “ And “ lastly, that he, the said defendant shall and will, during the “ term of his natural life, continue to *employ exclusively* the said “ plaintiffs to make all the cordage that may be *ordered of him* “ by or for the particular friends or connexions of the said “ defendant, *on the terms aforesaid*; and shall not, nor will employ any other person or persons whomsoever to make any “ other

1806.

GALE
against
REED.

[88]

[89]

“ other cordage, or any part thereof, under any pretence “ whatsoever.” The covenant is, it will be observed, to employ the plaintiffs *exclusively* to make the cordage which may be ordered “ *on the terms aforesaid.*” These latter words incorporate in this covenant, by reference, all the antecedent provisions of the indenture containing the terms upon which this exclusive employment was to be given to the plaintiffs. What then are those terms? principally these: the allowance of 2s. per cwt. to the defendant upon goods furnished on his recommendation, where the debts turned out good; and a liberty to the plaintiffs to refuse the orders of persons they should be disinclined to trust. As these refused orders could of course produce no good debts to the plaintiffs, they could not of course produce any fund for the allowance of 2s. per cwt. to the defendant, which was to arise only out of *debts* turning out to be *good*. There were therefore orders not within the scope of the *exclusive* employment stipulated for, and to which the stipulated compensation could not apply; and which, after being so refused by the plaintiffs, might therefore be executed by the defendant; he being restrained only as to cordage, &c. ordered *on the terms aforesaid*, of which terms the payment of 2s. per cwt. out of good debts was the most important and material. Supposing the former part of this covenant to be, for the reasons given, properly-narrowed by the terms of dealing to which it refers, it will hardly be contended that the more general words to be found in the latter part of the same covenant shall not be restrained and qualified by the same context. The words are, “ and shall not nor will employ any other person or persons whomsoever to make any other cordage, or any part “ thereof, under any pretence whatsoever.” To construe them according to the strict letter would impose a restraint without compensation to the party restrained, and to the possible prejudice of the public. Whereas to construe them with reference to the immediately antecedent words of the covenant in question, and to the true scope and object of the whole indenture, renders the sense uniform and consistent throughout, makes the compensation and restraint commensurate with each other, and obviates the possible inconvenience both public and private, which might result from a different construction. And this mode of construction is agreeable to the received rules and maxims, as well as to the authorities of law: for as is said in *Plowd.* 18., “ The scope and end of every matter is principally

1806.

—
GALE
against
REED.

[90]

“ to be considered; and if the scope and end of the matter be
 “ satisfied, then is the matter itself and the intent thereof also
 “ accomplished.” So Lord *Hobart*, 275., “ The law being to
 “ judge of an act, deed, or bargain, consisting of divers parts,
 “ containing the will and intent of the parties, all tending to
 “ one end, doth judge of the whole, and gives every part his
 “ office to make up that intent, and doth not break the words
 “ in pieces.” And accordingly in many cases the most general
 words in a deed have been holden to be narrowed and restrained
 by the apparent object and intent of the parties, as collected
 from other parts of the same deed. Thus in *Broughton v. Con-*
way, Moor, 58; in debt upon obligation with this condition,
 that whereas the defendant had sold to the plaintiff a lease for
 years of the manor of *S*, *he would not do nor had done* any act
 to disturb the plaintiff’s possession of it; *but* that the plaintiff
 should hold and enjoy this peaceably, without the disturbance
 of the defendant, or any other person; it was holden by all the
 justices that the defendant was not bound by the words of the
 condition to *warrant* peaceable possession to the vendee, but
 only against acts done or to be done by himself; and that all
 the sequel of the condition which comes after the word *but* shall
 be referred to the antecedent part of the condition, and ex-
 pounded and extended in like manner; that is to say, that he
 shall enjoy it without disturbance of any person or persons by
 any act *by him* done or to be done. So the case cited in *Shep.*
Touch. 169, as determined by *Bridgman Justice*; if one make a
 lease for years of a manor, and covenant that the lessee shall
 make estates for life or years, and that they shall be good; in
 this case it seems this covenant shall not be taken to enable the
 lessee to make estates for a longer time than his estate will
 bear. Feeling ourselves therefore warranted, by these and
 other authorities of the law, in narrowing, according to the
 intention of the deed, the general words of the restrictive co-
 venant to those cases of restraint only in which the party re-
 strained can have the stipulated benefit for his restraint; and
 the party, in whose favor the restraint is created, shall choose
 to avail himself of the restraint imposed upon the other, the
 covenant in question will stand clear of the objection made to
 it, as being a particular restraint of trade without adequate con-
 sideration; and that objection being removed out of the way,
 (as for the reasons above stated we think it is,) the plaintiff is
 entitled to judgment.

1806.

DOE on the Demise of HARRIS *against* GREATHED and Others.Tuesday,
Nov. 25th.

THIS was an ejectment brought by the lessor of the plaintiff, as heir at law of *E. Greathed*, Esq. on demises laid subsequent to *E. G.*'s death; and at the trial before *Le Blanc J.* at *Winchester* in 1805, a verdict was found for two of the defendants who were in possession of leasehold estates only, and for the plaintiff against the other defendants, subject to the opinion of the Court on the following case.

The lessor of the plaintiff is heir at law to *Mr. Greathed*, who died seised in fee of the premises on the 18th of *January* 1803. *Mr. Greathed* on the 13th of *October* 1790 purchased of Lord

One having purchased of *A.* the manor and certain lands of and in *Hampreston* in the counties of *Dorset* and *Hants*, and having settled a rent charge on his wife out of his manor of *Hampreston*,

in the county of *Dorset*, and all other his lands, &c. in *Hampreston* aforesaid, which he bought of *A.*; and having afterwards purchased of other persons other lands in *Hampreston* in *Hants*, (which were near to another estate of his called *Uddens* in *Dorset*;) by his will, reciting and confirming the settlement, devised to trustees, "the SAID manor, &c. and other hereditaments of and in *Hampreston* AFORESAID, and all other the manors, lands, farms, &c. and other hereditaments in or near *Uddens* aforesaid, or elsewhere in the said county of *Dorset*," to trustees for different uses: amongst others, giving his wife an additional rent-charge, payable out of "the manors and hereditaments in the said county of *Dorset*:" and as to all and singular "the said manors and other hereditaments, in the said county of *Dorset*, with their appurtenances, &c. charged as aforesaid," he devised the same to the first and other sons of his body, remainder to his daughters, in strict settlement; and if all but one of his daughters died without issue, then as to the entirety of the said manors "and other hereditaments," to the daughters of his remaining daughter in tail, &c.; remainder to the lessor of the plaintiff, his nephew, and heir at law, remainder to his sons and daughters in strict settlement, remainders over to other junior nephews in like manner; with power to the trustees to raise money on the security "of the manors and other hereditaments in the said county of *Dorset*;" and also to sell the devised lands, except such as were situate at *Uddens*, or *Hampreston* aforesaid, and to purchase other lands in fee within the said manor of *Hampreston*, in the said county of *Dorset*," &c. The deviser, by a subsequent codicil, in which he speaks of the prior devise of his *Dorsetshire* estate, revoked the devise to the lessor of the plaintiff. Held that the *Hampreston* lands lying in *Hants*, and not purchased of *A.*, though situated within and surrounded by the general ambit of *Dorsetshire*, and also near *Uddens*, and holden together with, and as part of, a *Dorsetshire* farm, did not pass by the will; which was confined in express terms to the manor and lands in *Hampreston*, purchased of *A.* (by force of the words "SAID manor, &c. and hereditaments AFORESAID," referring to the recital of the settlement, or which lay in the county of *Dorset* (by the addition of the latter words; which would not have been necessary if the deviser had meant to pass all his lands near *Uddens*, in whatever county situated.) For though when a thing is certainly expressed at first, the addition of another certain description may be rejected as superfluous; yet it is otherwise where the thing at first described is uncertain; as here, lands, &c. near *Uddens*.

1806.

DOE dem.
HARRIS
against
GREATHED.

Arundel, who by bargain and sale of that date conveyed, *the manor or lordship of Hampreston, in the several counties of Dorset and Southampton*, with its rights royalties, members, and appurtenances, and the advowson of the rectory of *Hampreston*, and all glebe lands, tithes, &c.; and all the messuages, farms, lands, tenements, cottages, rents, and hereditaments of him, Lord *Arundel*, situate lying and being within or arising out of or from the manor, parish, hamlet, place, precinct, or territory of *Hampreston aforesaid*, with their and every of their appurtenances, to the use of Mr. *Greathed* in fee. And by indentures of lease and release of the 16th and 17th of October 1795, being a settlement made before his marriage with *Jane Glover*, Mr. *Greathed* conveyed "all that the manor or lordship of *Hampreston* in the county of *Dorset*, and all other his messuages or tenements, farms, lands, and hereditaments in *Hampreston aforesaid* which were lately purchased by him from Lord *Arundel* and conveyed by Lord *Arundel* to him in fee, with their rights, members, and appurtenances, and the reversion, &c. unto *M. Raper* and *W. W. Bird* and their heirs, for securing (inter alia) a yearly rent charge for his intended wife;" and a term of 99 years was also limited to the trustees for that purpose. The premises recovered by the verdict are about 120 acres, situate in the hamlet of *Lougham* within that part of the manor and parish of *Hampreston* which lies in *Hampshire*. The parish and manor of *Hampreston* are co-extensive, and lie within the general boundary of the county of *Dorset*, about 2 miles distant from the general boundary of *Hampshire*. Mr. *Greathed's* estates in *Dorset* and *Hants* exceed 4000 acres, of which the *Uddens* estate contains 500 a.; wastes in *Hampreston* 2110 a.; farm lands in *Hampreston* in the county of *Dorset* about 1270 a.; the lands recovered by the verdict as in *Hampshire* about 120 a. Other persons have freehold lands in *Hampreston* in *Dorsetshire*, which amount to about 200 acres: and other persons have also some freehold lands in *Hampreston* in *Hampshire*. The annual value of the lands recovered by the verdict is about £150. The rental of Mr. *Greathed's* estate in *Hampreston*, including the lauds recovered, is about £1200 per annum. The *Hampshire* lands recovered by the verdict lie in small scattered pieces, many of them surrounded entirely by lands in the county of *Dorset*, and all of them lying within the general boundary of that county. The other *Hampshire* lands

above-

1806.

DOE dem.
HARRIS
against
GREATHED.

[94]

above-mentioned (i. e. of other persons) are similarly situated. The lands recovered were not purchased by Mr. *Greathed* of Lord *Arundel*, but of different persons, prior to the date of his will, (except in the instance of certain lands, which were purchased with the manor and farm of *Hilham* lands, and of a house called *Belle Vue*; and this purchase was completed before the making of the last codicil hereinafter stated:) and they principally consist of certain parts of four estates called *Redmans*, *Mitchels*, *Frouds*, and *Lynes*, or *Haywards*, lying as before described in the county of *Hants*; the other part thereof lying in *Dorset*. About 40 acres of the premises are common field arable land. The closes called *Stirts*, part of the lands recovered, consist of about 13 acres, are situate in *Hampshire*, and are parcel of a manor and farm called *Hilham* lands, containing about 114 acres, and lying (with the exception of *Stirts*) in the county of *Dorset*. Both before and since Mr. *Greathed's* purchase *Stirts* have been let and occupied with *Hilham* lands farm. The rest of these lands, when bought by Mr. *Greathed* at different times, were in the hands of different occupiers: and as their several interests determined he laid them in such parcels as he thought convenient to different farms of his own in *Dorsetshire*. Mr. *Greathed* knew distinctly that the lands recovered were in *Hampshire*. In a lease granted by him to *John Parmiter* of *Hampreston* farm the parcels are thus described, *all that farm called Hampreston farm, situate at Hampreston in the county of Dorset, and parcel of the said manor of Hampreston, now in the occupation of him the said E. Greathed, consisting of the particulars therein enumerated, amongst which are between 7 and 8 acres of meadow land, part of Redmans, and part of the premises recovered, and which had been thrown to that farm by the testator. One only of his tenants, J. B., one of the defendants, had more Hampshire than Dorsetshire land. The testator was seised in fee of the manor and farm of Uddens where he resided, which is in Dorsetshire, in the parish of Chalbury, immediately adjoining the northern boundary of the parish and manor of Hampreston, and about 3 miles distant from the remotest part of the premises recovered. Hamwood, part of the premises recovered, is divided from Uddens farm only by a rivulet and a lane. Mr. Greathed by his will dated the 20th February 1796, reciting that by indentures of lease and release of the 16th and 17th October 1795, being a settlement made*

1806.

DOE dem.
HARRIS
against
GREATHED

[95]

before the marriage with *Jane* his then wife, he had conveyed his manor of *Hampreston in the county of Dorset*, and his messuages and tenements, farms, lands and hereditaments in *Hampreston aforesaid*, with their and every of their *rights*, members, and appurtenances, *which said manor* and other hereditaments were then lately purchased by him from Lord *Arundel*, unto *M. Raper* and *W. W. Bird* and their heirs, for securing a yearly rent charge for his wife, with the usual powers of distress, &c. and also by a term of 99 years, &c. ratified and confirmed the said rent charge powers, &c. and term of 99 years; and then devised as follows: " I give and devise unto *W. Wilberforce* " and *W. W. Bird* and their heirs, *the said manor* or lordship, " messuages or tenements, and other hereditaments of and in " *Hampreston aforesaid*, and all and singular other the manors or " lordships, &c. messuages, lands, tenements, farms, and other " hereditaments situate, lying and being *in or near Uddens aforesaid*, or *elsewhere in the said county of Dorset*, and all and singular the manors or lordships, lands, &c. situate in the county " of *Lincoln*, of which I or any person in trust for me am or " are seised or entitled to for any estate, &c. (freehold or copyhold) in possession, reversion, remainder, or expectancy, with " their and every of their rights, members, and appurtenances; " to hold the said manors, &c. and all and singular other the " premises hereby devised, or expressed or intended so to be, " with their appurtenances (but as to the said manor and other " hereditaments of and in *Hampreston aforesaid*, subject and " charged as herein-before is mentioned) unto the said *W. Wilberforce* and *W. W. Bird*, their heirs and assigns, to and " for the uses and trusts, &c. and subject to the powers, &c. " hereinafter expressed; viz. as to all and singular the manors " or lordships, messuages, lands, tenements, and hereditaments " *in the county of Dorset*, to the use, intent and purpose that my " wife may during her life and widowhood, and the minority " of any son who under my will may for the time being be " entitled to the said manors and other hereditaments in the " *said county of Dorset*, or any part or share thereof, occupy the " mansion-house at *Uddens aforesaid*, and the gardens, &c. " belonging thereto, and all the land or ground adjoining to or " near the same, as occupied by me as a farm or otherwise, " and that no rent or other consideration whatsoever shall be " payable by her for the same; and that all taxes and repairs " for

[96]

1806.

DOE dem.
HARRIS
against
GREATHED.

“ for keeping the said house, &c. and grounds in the same state
 “ in which I shall leave the same shall be paid out of the rents
 “ and profits of my said *Dorsetshire estates*; and that during
 “ such minority I direct that my wife shall during her widow-
 “ hood receive the rents, issues, and profits of all my *said estates*
 “ *in the said county of Dorset*, and thereout pay the taxes, repairs,
 “ and expences aforesaid; in the next place shall pay on account
 “ of the child so entitled to my said manors and other heredita-
 “ ments such annual sum for maintenance as she shall think fit,
 “ and apply the surplus of the said rents, issues and profits as
 “ *herein mentioned.*” The testator then goes on, that in
 default of issue of the said testator (which happened to be the
 case) he gave his wife in addition to the yearly rent charge of
 400*l.* provided for her by the before recited indentures the
 annual sum of 200*l.* to be charged upon and payable out of all
 and singular the manors and other hereditaments *in the said*
county of Dorset. And as to all and singular the said manors
 and other hereditaments *in the said county of Dorset*, with their
 rights, members, and appurtenants, subject and charged as
 before mentioned, he devised the same to the use of the first and
 other sons of his body for life, with divers remainders over in favor
 of his own issue; which never took effect; the testator dying
 without ever having any issue: remainder, if all but one of his
 daughters die without issue, then as to the *entirety of the said*
manors and other hereditaments, to the daughters of his remain-
 ing daughter as tenants in common in tail; remainder to his
 nephew *J. Greathed Harris*, (the lessor of the plaintiff,) for
 life; and so on to his sons and daughters in strict settlement;
 remainder to his nephews *George Edward* and *Thomas Herbert*
Harris, and his niece *Mary Harris*, the younger brothers and
 sister of the said *J. G. Harris*, and their sons and daughters
 successively in strict settlement; remainder to the said *W. W.*
Bird in fee. Power was given to the trustees to raise money on
 the security of the manors and other hereditaments situate *in the*
said county of Dorset therein-before mentioned to be thereby
 devised; and the same was directed to be invested in the pur-
 chase of lands of inheritance to be situate *in the county of Dorset*,
 or of copyhold lands convenient to be held therewith or with
 the lands thereby devised. Leasing and jointuring powers were
 also given to the several takers for life of these premises, which
 the testator sometimes described as his *manors or hereditaments*

[97]

1806.

DOE dem.
HARRIS
against
GREATHED.

[98]

in the said county of Dorset, and sometimes as his Dorsetshire estate. Then followed a power to the trustees, at the request of the party entitled, to sell any part of the hereditaments thereby devised or intended so to be (except such of the said hereditaments as were situated at Uddens or Hampreston aforesaid, or either of them,) and to purchase other lands and hereditaments in fee simple in possession, to be situate somewhere within the said manor of Hampreston in the said county of Dorset, or of copyhold or leasehold lands convenient to be held therewith or with the lands purchased. The testator by a codicil dated the 2d of June 1797 declared that if there should be a failure of issue of his body during the widowhood of his wife, he devised all and singular the estates devised by, or which should be purchased under the trusts of, his will to his wife during her widowhood: and after making some other alterations in his will, not affecting the present question, he in other respects ratified the same. He also re-published, ratified, and confirmed his will by two other codicils dated respectively the 27th September 1797 and 10th April 1802. The testator by another codicil, dated 15th May 1802, gave several annuities to persons thereinmentioned, which he charged upon his Dorsetshire estate; and then revoked all the devises, &c. in his will in favour of his nephew, J. G. Harris, the lessor of the plaintiff, or his issue; and devised to his nephew Edward Harris, in fee, the estates in the county of Lincoln, devised by his will to J. G. Harris, in fee, but subject and without prejudice to the uses and trusts which, by his will, or by his codicil of the 2d June 1797, preceded the devise to his said nephew J. G. Harris, in fee. The testator then devised all his lands in the county of Lincoln, which he purchased since he signed his will to his wife for her widowhood, and after her decease to Edward Harris, in fee. The testator then declared that the estates, trusts, and powers, by his will, devised in his Dorsetshire estate to or in favour of his nephew Edward Harris, and his issue, should precede the estates, trusts, and powers, by his will devised in that estate in favour of his nephew George Harris, and his issue; and he devised the same estate accordingly; and in other respects confirmed his will. The testator, by another codicil of 17th January 1803, ratified and confirmed his will and codicils, so far as the same were not affected by such codicil of the 17th January, which made no disposition material to the present question. The above will and
codicils

codicils were duly executed and attested to pass real estates. The testator died on the day before-mentioned, leaving *Jane*, his now widow, surviving him. The question for the opinion of the Court was, whether the plaintiff were entitled to recover? if he were, the verdict was to stand: if not, a nonsuit to be entered.

1806.

DOE dem.
HARRIS
against
GREATHED.

[99]

This case was argued in *Trinity* term last by *Dampier* for the lessor of the plaintiff, and *Casherd* for the defendant. The argument turned upon this, whether or not, there being no probable reason a priori to presume that the devisor had contemplated any distinction between such part of his *Hampreston* estate as lay within the county of *Hants*, and such part as was within the county of *Dorset*, the words of the will were capable of including the former, inasmuch as the description of the subject matter of the devise appeared in the terms of it to be confined to lands purchased of *Lord Arundel* (which the premises in question were not) or to lands lying in the county of *Dorset*. For the plaintiff, the strict grammatical and legal meaning of the words; the frequent recurrence of the same description; the knowledge of the fact by the devisor that the lands in question were within the county of *Hants*; and the necessity of express words or necessary implication to pass an estate to another in disherison of an heir at law (a); were principally relied on. For the defendant were urged the highly probable intent of the devisor (b), from the connexion and local unity of the premises in dispute with the body of his estate in *Dorsetshire*; the situation of them within the general local ambit (c) of the latter county, in the legal boundary of which county the great mass of the estate lay; which might give occasion in common parlance to designate the whole as his *Dorsetshire* estate; circumstances which, though de hors the will, might be taken in aid to discover his intent (d); the sufficient designation of the premises either as "*hereditaments of and in Hampreston aforesaid*, or as *near Uddens*," (which is a distinct description from the ensuing words, "or elsewhere in the county of *Dorset* (e):)" being in part divided

[100]

(a) *Gardner v. Sheldon*, *Vaugh.* 262. and *Doe v. Child*, 1 *New Rep.* 345.

(b) *Moone v. Heaseman*, *Willes*, 141. and *Roe v. Wichett*, *ib.* 309.

(c) *Shep. Touch.* 87. pl. 3. and *Lane v. Lord Stanhope*, 6 *Term Rep.* 352.

(d) *Doe v. Collins*, 2 *Term. Rep.* 498.

(e) *Atkins v. Longvile*, *Cro. Jac.* 50.

1806.

DOE dem.
HARRIS
against
GREATHED.

from it only by a lane and rivulet; a construction which, the words admitting of it, ought to be received, ut res magis valeat quam pereat; a maxim which governs the construction even of deeds (a), and, a fortiori, of wills; and where the words of a grant are sufficiently certain in themselves, words of additional erroneous description will not vitiate the former (b): also the frequent republication of his will by the devisor, after new purchases; which shewed his intent not to die intestate as to any part of his property; the power to the trustees to sell, except in *Hampreston*, and to purchase other lands there, or which lay convenient to be holden therewith; and lastly, the revocation of the first devise to the heir at law.

Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court.—The point to be decided in this case is, whether the several lands, of which the testator was seised at the time of his death, and which lie in parts of *Hampshire*, surrounded by *Dorsetshire*, and were occupied with, and had been laid to lands and farms in *Dorsetshire*, and which were not bought of Lord *Arundel*, passed by Mr. *Greathed's* will: and we are of opinion, that they did not. The case states that in the year 1795, previous to his marriage with *Jane Glover*, his intended wife, the testator conveyed to trustees to the uses of his marriage settlement, certain lands, by the description of “All that the manor or lordship of *Hampreston*, “in the county of *Dorset*, (part of which manor lies in *Hampshire*,) and all other his messuages or tenements, farms, lands, “and hereditaments, of him the said *Ed. Greathed*, in *Hampreston*, “aforesaid, which were lately purchased by him from H. Lord “*Arundel*, and conveyed by the said H. Lord *Arundel* to him “the said *Ed. Greathed* and his heirs.” And that the testator, having by his will dated the 20th of *March* 1796, recited, that by the said settlement he had conveyed his manor of *Hampreston*, in the county of *Dorset*, and his messuages or tenements, farms, lands, and hereditaments, in *Hampreston* aforesaid; *which manor and other hereditaments were then lately purchased by him from Lord Arundel*, to *M. Raper*, and *W. W. Bird*, to the uses of that settlement; devised in the following words, upon which the ques-

(a) *Doe v. Packhurst*, 3 *Atk.* 136.

(b) *Plowd.* 192. *Bro. Abr. Annuity*, pl. 3. *Grants*, pl. 4. *Dy.* 87. a. pl. 101. And *Goodtitle v. Paul*, 2 *Burr*, 1019. and 1 *Blac. Rep.* 255.

1806.

DOE dem.
HARRIS
against
GREATHED.

tion turns. "I give and devise unto *W. Wilberforce*, and *W. W. Bird*, and their heirs, the SAID manor and lordship, messuages " or tenements, and other hereditaments of and in *Hampreston aforesaid*, and all and singular other the manor or lordships, " messuages, lands, tenements, farms, and other hereditaments, " situate, lying, and being in or near *Uddens aforesaid*, or else- " where in the county of *Dorset*; and all and singular the manors " or lordships, messuages, lands, tenements, and hereditaments, " situate, lying, and being in the county of *Lincoln*, of which I, " or any persons in trust for me, am or are seised." The will then proceeds to state the uses to which the trustees were to be seised thus; viz. "As to all and singular the manors or lord- " ships, messuages, lands, tenements, and hereditaments, in the " county of *Dorset*," to certain uses, not necessary to repeat, in- asmuch as nothing depends upon them; and the plaintiff, in con- sequence of the subsequent codicils, would not be entitled to recover, supposing the lands in question to have passed by the will to the trustees, *Wilberforce* and *Bird*. Having thus shortly adverted to all that is stated in this case, upon which the question between the parties is to be decided: for a great deal of irrelevant matter has been introduced into it; I will state the reasons on which our opinion is founded; viz. that the devise is confined to the lands bought of Lord *Arundel*, or lands lying in the county of *Dorset*. By the first part of the devise, the testator having recited the settlement, on his intended marriage, of the manor of *Hampreston*, and other lands lately bought of Lord *Arundel*, confines the devise to what he had so bought, by using the words *said* manor, and hereditaments *aforesaid*: and if we were to hold that this devise would pass lands not bought of Lord *Arundel*, (and those in question were not bought of him,) we should alter his expressions, render the recital useless, and comprehend that which he has in terms excluded. Thus the question stands on the first part of the devise. The latter part of it is in these terms; "And all and singular other the manors, &c. and " other hereditaments, situate, lying, and being in or near " *Uddens aforesaid*, or elsewhere, IN THE COUNTY OF DORSET;" which words, we think, confine the devise to lands in *Dorset- shire*: for had the testator meant, that all the lands near *Uddens* should pass, in whatever county they might happen to be situate, it would have been sufficient to have said dear *Uddens aforesaid*, to ascertain which the county was not necessary:

[102]

[103]

1806.

DOE dem.
HARRIS
against
GREATHED.

necessary : and the natural construction of the words, “ or else-
“ where in the county of *Dorset*,” is to restrain the devise to
lands in *Dorset* ; as if the expression had been, *all other lands in*
the county of Dorset, near Uddens aforesaid, or in any other place
in that county. And had the testator, according to the argument
for the defendant, used the words *near Uddens*, as descrip-
tive of the lands he meant to devise, without regard to the
county, he must have meant them as descriptive of some
lands, which, from their proximity to *Uddens*, might be distin-
guished from others more remote ; but such argument is not
consistent with the defendant’s claim to ALL. But it does not
seem to us that the testator contemplated any other distinction
between the lands he meant to devise, but their lying in the
county of *Dorset* or of *Lincoln*. In thus construing the will,
we shall give it, as we conceive, its natural and proper sense, col-
lecting the intent of the testator from the words he has used
as applied to the subject matter ; without travelling into
matters collateral and foreign to the will, which ought not to
be. And in putting upon it the construction we have done, we
guide ourselves by the rules we find laid down for the interpre-
tation of written instruments. In *Plowden*, 191. this rule is
laid down ; “ There is a diversity where a certainty is added
to a thing, which is uncertain, and where to a thing certain.
For if I release all my right *in all my lands in Dale*, which I
have by descent on the part of my father ;” and I have lands
by descent on the part of my mother, but no lands by descent
on the part of my father : there the release is void. But if the
release had been of *Whitacre in Dale*, which I have by descent
on the part of my father ; and I had it not by descent on the
part of my father, but otherwise ; yet the release is good : for
the thing was certainly expressed by the first words, in which case
the addition of another certainty is not necessary, but superfluous.
Now in the question before us, in the latter part of the devise,
there is no special description or name of the lands devised, so
as to make the addition of something to ascertain the lands not
necessary but superfluous : and if they may have that effect they
ought not to be rejected. And even in cases where you give a
thing a proper name, Lord *Bacon* says, in his 13th Maxim, that
“ the falsity of addition or demonstration doth not hurt ; yet
nevertheless if it stand *doubtful* upon the words, whether they
import a false reference and demonstration, or whether they be
words

[104]

words of restraint that limit the generality of the former name, the law will not intend error or falsehood." As to the argument founded on the circumstance of the lands in question being in parts of *Hampshire*, lying within the general boundary of *Dorset*; the answer given by the counsel for the plaintiff, we think, is a good one, namely, that where lands are spoken of as lying in a county, it is meant that they are a *part* of that county. For these reasons we are of opinion there should be judgment for the plaintiff. (a)

(a) Vide *Tuttesham v. Roberts*, *Cro. Jac.* 22. and *Norris and Cam-pion's case*, *Dy.* 292. a.

1806.

DOE dem
HARRIS
against
GREATHED.

[105]

RICKMAN *against* STUDWICK.

Wednesday,
Nov. 26th.

UPON a rule nisi for discharging on common bail the defendant, who had been arrested for a debt under £20 the question was, whether a drill serjeant in a volunteer corps, being sworn and receiving constant pay, as described in the stat. 44 *Geo.* 3. c. 54. s. 20 & 21. were entitled to the privilege from arrest given to soldiers in the regular army by the mutiny act? *Bowen*, in support of the rule, contended for the affirmative; because being put on the same footing, and subjected by the 21st section of the first-mentioned act to the same trial and punishment, it must have intended to give him the same privilege; which consequence *Burrough* *contra* denied; and referred to the 23d section, which expressly subjects volunteers corps, in certain cases only, to the discipline and provisions of the mutiny act.

And of this latter opinion was the Court: Lord *Ellenborough* C. J. saying, that the mutiny act attached only on persons *en-listed*: But drill-serjeants, &c. in volunteer corps are, by the act in question, only subject to the regulations of the mutiny act so far as relates to trial and punishment by courts martials composed of yeomanry or volunteer officers, for the purpose of securing their obedience; but the mutiny act does not extend to them for other purposes than those there mentioned.

Rule discharged.

Volunteer
drill-ser-
jeants, &c.
though sub-
ject to the
regulations
of the mutiny
act for trial
and punish-
ment by vo-
lunteer
courts mar-
tial accord-
ing to the
stat. 44 *Geo.* 3.
c. 54. s. 21.
are not privi-
leged from
arrest for
debts under
20l. as regu-
lar soldiers.

1806.

Wednesday,
Nov. 26th.CATHROW *against* HAGGER.

An affidavit to hold to bail, only stating that the defendant was "*indebted to the plaintiff for goods sold and delivered (not saying by the plaintiff to him the defendant,)*" is insufficient.

THE affidavit to hold the defendant to bail stated that he was "*indebted to the plaintiff for goods sold and delivered to him the defendant,*" not stating *by the plaintiff*; upon which a rule nisi having been obtained for discharging the defendant out of custody on filing common bail, for the insufficiency of the affidavit.

Walker shewed cause; and said that the defendant being sworn to be *indebted to the plaintiff* for the goods, they must have been sold and delivered by him; and he distinguished this from *Perks v. Severn (a)*, where it was only sworn that the defendant was *indebted to the plaintiff for goods sold and delivered*, not saying sold, &c. *to the defendant*, and therefore they might have been furnished upon the credit of a third person.

Lawes, contra, relied on the case mentioned; and said that here the goods may have been sold *by another*, and the debt assigned to the plaintiff: and that, as no affidavit in answer could be made, the affidavit to hold to bail ought to be positive, and not argumentative.

The Court, thinking the objection well founded for the reason stated, made the

Rule absolute.

(a) 7 *East*, 194.

[107]

Wednesday,
Nov. 26th.The KING *against* GIBSON.

A defendant in an indictment for a misdemeanor cannot plead over to the charge after a plea in abatement for a misnomer, on which issue is taken and found against him.

THE defendant was indicted at the sessions for an assault by the name of *Benjamin Gibson*, to which he pleaded a misnomer, in his Christian name, that it was *Benoni*, and not *Benjamin*; and issue being taken by the replication on that fact, at the trial a verdict was found for the prosecutor; and the indictment being removed by certiorari, at the instance of the pro-

secutor

secutor in this court, a rule was given by him in the present term for final judgment, and the defendant served with notice to appear and receive judgment: whereupon the defendant obtained a rule, "upon reading the record in this prosecution, calling on the prosecutor to shew cause why the defendant should not be at liberty to plead *not guilty* to the indictment."

1806.

—
The KING
against
GIBSON.

Richardson shewed cause, and contended that peremptory judgment must be given upon a plea in abatement in misdemeanor found against the defendant, and not merely a judgment to answer over to the offence. The distinction is between misdemeanor and felony: in the latter case, if a plea in abatement be found against the defendant, he shall plead over to the felony; but this is a privilege allowed only *in favorem vitæ*, and does not apply to cases where life is not in jeopardy (a). In strictness indeed, if the prisoner plead in abatement, he shall at the same time plead over to the felony; otherwise, the prosecutor may move the court to enforce him to do so, or may reject the plea: though if it be received, it is not bad on demurrer for want of pleading over to the felony (b); nor is the defendant concluded by such omission; but having pleaded both pleas, they shall be tried by the same inquest, which is to pass on the prisoner, and is ready at the bar (c). And *Hawkins* (d) says, that in these respects an appeal or indictment of felony differs from "appeals of mayhem and all civil actions whatever," (except assizes of mortdancestor, &c.) where "if a plea in abatement triable by the country be found against the defendant, he shall not be suffered afterwards to plead any new matter, but final judgment shall be given against him." Now as the only instance mentioned of pleading over is in case of felony, it is evident that he meant to class misdemeanors with appeals of mayhem and civil actions: and in that sense must be understood what *Hawkins* adds in the same section, "Also it seems agreed, that in all other actions, except those abovementioned, if a defendant, together with a plea in abatement, plead also a plea in bar, or the general issue, he waves the plea in abatement, and the plea in bar or general issue only shall be tried." For which he cites many authorities in the margin; amongst others,

[108]

(a) 2 *Hale*, P. C. 239. cites 22 *Ed.* 4. 39. b. and 9 *H.* 4. 1. b.

(b) *Orbell v. Ward*, *Carth.* 56.

(c) 2 *Hale*, P. C. 238, 9. 2 *Hawk. P. C.* ch. 23. s. 128.

(d) *Ibid.* and vide *Finch's Law*, 385.

1806.

The KING
against
GIBSON.
[109]

Kirton v. Williams and others (a), where an appeal of mayhem such double pleading was disallowed, as not admitted in any case but where life was in jeopardy, and then in *favorem vitæ*. And *Hawkins* refers to the same law in other passages (b) as applicable to pleas in abatement to indictments.

Raine and *Littledale*, contra, (in answer to a question from the Bench) admitted that they had not found any express adjudication of the right of pleading over in misdemeanor after a plea in abatement found by the country against the defendant : but they said that there was no adjudication to the contrary ; and therefore, in the absence of all express authority upon the subject, recourse must be had to legal analogy ; and that is stronger between misdemeanor and felony than between misdemeanor and civil actions. The appeal of mayhem, though penal in its consequences, is in its form a mere civil proceeding ; and so *Hawkins* evidently considers it when he speaks in the section referred to (c), of “ appeals of mayhem and all other civil actions :” but the form of proceeding in misdemeanor is the same as in felony. So *Hawkins* applies the rule of pleading over, after pleading in abatement, to all felonies generally, and not merely to those which are capital ; and misdemeanors transportable are as penal as clergyable felonies. The original source of the distinction in *favorem vitæ* may be traced to the year-book, 22 Ed. 4. 39. b., which is quoted by Lord Hale and others for this purpose ; and reference is also made to it in *Brooke’s Abr.* (d). Now that was an appeal of death ; and the expression of *in favorem vitæ* was used by *Fairfax* as an argument for the pleading over, and not as derived from any principle of the common law limiting its application to cases of life and death. And as it is admitted that in assize of morden-
[110] cestor (e), novel disseisin, nuisance, and juris utrum, such double pleading is allowed, there is no reason why the same privilege should not extend to cases of misdemeanor ; though, for what reason does not appear, it does not extend to appeals of mayhem. And they referred to a precedent in *Trem. P. C.* 188. *The King v. The Earl of Devon* ; which was an information against the Earl for challenging Mr. Culpepper in

(a) *Cro. Eliz.* 495. *Noy*, 34. And *Poph.* 115.

(b) 2 *Hawk. ch.* 25, s. 12. 150.

(c) 2 *Hawk. ch.* 23, s. 128.

(d) *Bro. Abr. Appel. pl.* 115.

(e) 1 *Roll. Abr.* 273.

the King's palace, and assaulting and wounding him there; to which he pleaded his privilege as a peer of parliament not to answer for such offence in any other than the Court of Parliament during its sitting, and for the usual time of privilege, i. e. for 40 days after prorogation: and because the information was exhibited against him within the 40 days, which were not then passed, he pleaded to the jurisdiction. To this there was a demurrer; and the Court gave judgment against the defendant, to plead over to the information.

1806.

—
The KING
against
GIBSON.

Lord ELLENBOROUGH C. J. The general principle of the common law is against pleading over after a plea in abatement found against the defendant; but there are several privileged cases, which are admitted by way of exception, and one of them is in case of felony, *in favorem vite*, and that extends to felony generally; because at common law the judgment is of death, though clergy may be demandable. Only one instance has been mentioned of the same privilege allowed in a case of misdemeanor, and that is the precedent referred to in *Tremaine*, which may have passed in the mere exercise of a discretionary power by the Court, on account of the magnitude of the punishment for striking another in the King's palace, being no less than the loss of the offender's hand: But at any rate the general point does not appear to have been presented to the notice of the Court in judicial debate; but it is cited merely from an entry in a book of entries (a). On the other hand the

[111]

(a) His Lordship afterwards asked whether any notice were taken of this case in the state trials: to which no answer was then given. But an account of it is to be found in 11 *St. Tr.* 133. taken from the Earl of Warrington's papers; and it is also reported in *Comb.* 49. There is some variation in the two statements: according to the former, after the Court had over-ruled the Earl's plea, and required him to plead to the information in the next term, he did accordingly then appear and plead guilty, and the Court awarded him to pay a fine of 30,000*l.* and be committed to the K. B. till payment, &c.: which proceedings were afterwards declared to be illegal by the House of Lords. But from *Comberbatch's Rep. E. 3 J. 2.* which is inaccurately expressed, it should seem that the advice of the Court to the defendant to plead in chief was before his plea of privilege was formerly put in; though insisted upon in argument both by the defendant and his counsel, "But notwithstanding this, (the *Report* states) the defendant put in his plea of privilege; to which there was a demurrer: and afterwards the plea was over-ruled by the Court. And he was fined 30,000*l.* in *Trin 3 J. 2.* It appears, however, from the record of this case, *ex relatione Mag^{ri}*

1806.

—
The KING
against
GIBSON.

[112]

the exception in case of felony, as founded in *favorem vitæ*, is expressly recognized by Lord *Hale*, who derives it from the case in the year books; and it is since adopted by *Hawkins*, though of less authority than Lord *Hale*, and stands also upon the case in *Popham's Reports*. When therefore the books agree in considering felony as an excepted case in *favorem vitæ*, they in effect exclude all other cases not also excepted: and if persons indicted for misdemeanors had been considered as entitled to the same privilege of pleading double, there must have been many instances of their having availed themselves of it to be met with in the books, many more probably than in cases of felony.

GROSE J. If the privilege of pleading over had been general we should not have heard of the exceptions.

LAWRENCE J. referred to 2 *Hawk. ch. 31. s. 6 & 7.* which says that "Howsoever the law may stand in relation to a general demurrer concluding in bar of an appeal or indictment, as in common demurrers in civil actions, &c. which admits the fact, &c.; it hath been adjudged that if an appellee demur in law to an appeal by reason of the insufficiency of the declaration, or generally demur to the declaration, with a conclusion, *et petit judicium de narratione illâ, et quod narratio illa cassetur*, &c.; such demurrer shall not conclude him from pleading over to the felony, either at the same time with the demurrer, or after it shall be adjudged against him. But it seems, that in criminal cases, not capital, if the defendant demur to an indictment, &c., whether in abatement or otherwise *the Court will not give judgment against him, to answer over, but final judgment.*"

LE BLANC J. The general rule is against the defendant; and the current of authorities shews that pleading over is only allowed in case of felony, in *favorem vitæ*.

Rule discharged.

Dealtry) that the Court gave judgment upon the plea of privilege, that the defendant should answer over: upon which he immediately pleaded not guilty to the information; and process issued to summon a jury to try that issue; but on the return of the process, the Earl withdrew his plea, and confessed himself guilty. Whereupon the Court sentenced him to give security for his good behaviour, and to pay a fine of 30,000*l.* and committed him, till payment, to the custody of the marshal in execution. But in *M. 3 J. 2.* the Attorney-General acknowledged satisfaction of the fine and of giving security; upon which the Court discharged him out of custody. In *Rex v. Johnson*, 6 *East*, 602. there was judgment of respondeat ouster after a plea to the jurisdiction in misdemeanor over-ruled upon demurrer.

1806.

*Thursday,
Nov. 27th.*LOWTHER *against* The Earl of RADNOR and Another.

IN trespass for breaking and entering the plaintiff's close, and taking his goods (which was for a distress) at *Tilshead*, in the county of *Wilts*, the defendant pleaded the general issue; and at the trial at *Salisbury*, in *March* 1803, before *Le Blanc J.* a verdict was found for the plaintiff, damages 6*l.* 13*s.* 6*d.* subject to the opinion of this Court on the following case. On the 27th of *Nov.* 1804, the two defendants, justices of the peace for the county of *Wilts*, made and signed the following order. "*Wilts* to wit. To *Thomas Lawes*, one of the tything men of *Tilshead*, in the county of *Wilts*, &c. Whereas *James Sopp* of *Shrewton*, in the county of *Wilts*, labourer, hath complained unto *J. T. B.* Esq. one of *H. M.* justices of the peace in and for the said county of *W.* that *G. Lowther*, Esq. residing at *T.* in the said county, refused to pay unto him, the said *J. Sopp* 4*l.* 13*s.* 6*d.* for wages justly due unto him for work and labour done by the said *J. Sopp*, and by *T. Franklin*, in the service of the said *G. Lowther*, by digging and steaming part of a well, at the said parish of *T.*: And whereas on the 13th of *Nov.* inst. the said *J. T. B.* by a precept under his hand and seal directed to the aforesaid *T. Lawes*, &c. did require them to summon the said *G. Lowther* to appear before him, *J. T. B.* and such other of his majesty's justices of the peace as should be present at *Fisherton Anger*, in the said county, on *Tuesday* the 20th of *Nov.* inst. to answer to the complaint of the said **J. Sopp*, and to shew cause why an order should not be made on the said *G. Lowther* for payment of the aforesaid sum: And whereas the said *G. Lowther* was, on the 16th of *Nov.* inst., duly served with the said summons by the said *T. Lawes*, but hath neglected to appear to answer the said complaint, and hath not paid to the said *J. Sopp* the said 4*l.* 13*s.* 6*d.* or any part thereof, and hath not shewed to us any sufficient cause

The statute 20 *G.* 2. c. 19, giving the magistrate jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, potters, &c. "and other labourers," employed for any certain time, "or in any other manner," respecting wages within certain sums, extends to labourers of all descriptions, and not merely in the particular trades or business there enumerated: and consequently includes wages earned by a labourer who contracted to dig and steam a well for cattle, to be paid for by

the foot, and who employed another to assist him in the work. The party appealing to the sessions is not thereby concluded from afterwards disputing its jurisdiction in the particular case. Trespass lies not against magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction, though the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time by the party complained against, having notice of such complaint, and being properly summoned to attend.

1806.

LOWTHER
against
The Earl of
RADNOR
and Another.

why the same should not be paid: We, whose hands and seals are hereunto subscribed and set, two of his majesty's justices of the peace, &c. being present at the time and place above appointed for the hearing of the said complaint, having duly examined the said *J. Sopp*, upon oath, touching the truth of the said complaint, and upon consideration thereof do adjudge the said complaint to be true, and that the said 4*l.* 13*s.* 6*d.* is justly due and owing unto him, the said *J. Sopp*, from the said *G. Lowther*. And we do hereby also adjudge and order the said *G. Lowther* to pay, or cause to be paid unto the said *J. Sopp* 4*l.* 13*s.* 6*d.* which appears to us to be just and reasonable to be paid by him, the said *G. Lowther*, to the said *J. Sopp*, as and for his wages as aforesaid. And we do hereby require you, &c. forthwith to give notice to the said *G. Lowther* of this our adjudication and order, and to certify to us what you shall have done concerning the premises when duly required, that in default of payment such other proceedings may be had therein as the law requires, &c." Mr. *Lowther* appealed to the *Wilts* quarter sessions against the order; and the appeal was heard at the *Epiphany* sessions 1805, when the order was affirmed by the sessions with 40*s.* costs to be paid by Mr. *Lowther* to *J. Sopp*. On the 19th of *April* 1805, the defendants made and signed the following warrant of distress. "*Wilts* to wit. To *Tho. Lawes*, &c. Whereas we, the Earl of *Radnor* and *Willm. Eyre*, Esq. two of his majesty's justices, &c. by an adjudication and order under our hands and seals, bearing date the 27th of *Nov.* last, did, amongst other things, upon the oath of *J. Sopp* of *S.* in the said county, labourer, adjudge and order *G. Lowther*, Esq. residing at *T.* in the said county, to pay, or cause to be paid, unto the said *J. Sopp* 4*l.* 13*s.* 6*d.* which appeared to us the said justices, to be just and reasonable to be paid by the said *G. Lowther* to the said *J. Sopp*, as and for his wages, (to wit) for work and labour done by the said *J. Sopp* and by *T. Franklin*, in the service of the said *G. Lowther*, by digging and steaning part of a well at the said parish of *T.*, as upon reference to the said adjudication and order will more fully appear: And whereas the said *G. Lowther* was, on the 5th of *Dec.* last personally served with the said adjudication and order, but hath neglected to pay the said *J. Sopp* the said 4*l.* 13*s.* 6*d.*, and hath not paid the same or any part thereof: And whereas, at the general quarter sessions, &c. held at

Devizes

[115]

1806.

LOWTHER
against
The Earl of
RADNOR
and Another.

Devizes, in and for the county of *Wilts*, on *Monday* the 14th of *Jan.* last, the said *G. Lowther* did enter and prosecute his appeal against the said adjudication and order, but the same was confirmed by the said Court; and the said Court did order and award the said *G. Lowther*, on notice thereof, to pay, or cause to be paid unto the said *J. Sopp* 40s. for the costs, &c. (of the appeal.) And whereas it appears to us that the said *G. Lowther* was, on the 19th of *Feb.* now last past, duly served with the said order of the said sessions, and payment of the said several sums of 4*l.* 13*s.* 6*d.* and 40*s.* hath been demanded of him by the said *J. Sopp*, but he hath refused to pay, and hath not paid the same, or any part thereof : these are therefore to command you forthwith to make distress of the goods and chattels of the said *G. Lowther*, &c. and thereout to pay the said two several sums of 4*l.* 13*s.* 6*d.* and 40*s.* to the said *J. Sopp*, &c." The warrant was delivered to *Lawes* the tythingman of *Tilthead* to be executed ; who on the 24th of *April* 1805 distrained and sold goods of the plaintiff to the value of 8*l.*, out of which he paid *Sopp* 6*l.* 13*s.* 6*d.* in pursuance of the warrant, and returned the surplus to the plaintiff. "*Steaning a well*" means lining it with stones and mortar. And it was proved that *J. Sopp* had on other occasions been employed by the plaintiff as a labourer in husbandry. Notice of the action was given to the defendants, and the action was regularly brought.

[116]

The case first came on to be argued in *Trinity* term last, when the Court thinking it was defectively stated, these facts were afterwards added. That the work was performed under a contract between the plaintiff and *Sopp*, by which the latter undertook to dig the well of a sufficient depth to supply the plaintiff's cattle with water, and for which, when it was deep enough to give a supply of water, he was to receive two shillings per foot. In the execution of the work *Sopp* was to employ whom he pleased to assist him, but the money was to be paid to *Sopp* alone. *Sopp* had before done other work for the plaintiff, for which he was paid by the piece and not by the day.

The questions stated for the opinion of the Court were, 1st, Whether the justices making the original order, or the quarter sessions, had jurisdiction to make the said orders, or either of them ? If they had not, then, 2dly, Whether the plaintiff had precluded himself from bringing this action by appealing to the quarter sessions against the original order ?

[117]

1806.

—
LOWTHER
against
The Earl of
RADNOR,
and Another.

Jekyll, for the plaintiff, contended, 1st, that the justices had no jurisdiction to make the original order. But if they had, 2dly, that they exceeded their jurisdiction, by ordering the money which had been earned by *Sopp* and *Franklin* to be paid to *Sopp* alone. 3dly, That the plaintiff was not precluded from bringing his action by having appealed to the Sessions. As to the first and principal point, the stat. 20 Geo. 2. c. 19. (a) is confined to servants in husbandry, and to the particular trades there mentioned, and to labourers assisting in such trades, though not regularly retained in or denominated by them. If the general words had been intended to extend to all labourers generally, it would have been nugatory to specify particular persons. Now the sort of work and labour stated to have been performed by *Sopp* was that of a bricklayer or mason, and they are not mentioned in the act. It was to dig and stean a well, by contract, at so much a foot, and to employ workmen under him; which is no part of the employment of a servant in husbandry, or of any of the workmen specified in the act; nor is it stated that *Sopp* was a person of either of those descriptions. And though it be stated that the well was to be made for the use of the cattle; that will no more make him a servant or labourer in husbandry, than one who makes ploughs or other farming utensils. He referred to *Regina v. London* (b), *Rex v. Bampton* (c), and *Rex v. Hulcott* (d), to shew that neither the stat. 5 Eliz. c. 4. nor the stat. 20 Geo. 2. c. 19. in pari materia though containing general words, had been considered to extend to labourers in general, but only to servants or labourers

[118]

(a) The statute gives jurisdiction to one or more justices of the peace to hear and determine disputes between "masters or mistresses" and *servants* in husbandry, who shall be hired for one year or longer, "(extended by 31 G. 2. c. 11. s. 3, to all *scrants* in husbandry, though, "hired for less time than a year) or between masters and mistresses "and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, "glassmen, potters, and *other labourers* employed for any certain time, "or in any other manner," to make order for payment of wages, &c. "not exceeding 10*l.* with regard "to any servant, nor 5*l.* with regard to any artificer, &c. potter or labourer."

(b) *Salk.* 441. and 6 *Mol.* 204.

(c) *Cald.* 11. This reference was principally to the learned Editors note (c) p. 14. where the subject is much considered, and to Dr. *Burn's* opinion there stated, that the word *Labourers* in the statute ought to be restricted to labourers of the classes and denominations enumerated.

(d) 6 *Term Rep.* 583,

in husbandry, or in the classes particularly mentioned. 2dly, He argued upon the excess of jurisdiction by the magistrates in awarding the whole of the money, part of which was earned by *Franklin*, to be paid to *Sopp*; supposing that the money was the earnings of a *labourer*, so as to bring the case within the general words of the statute: for, properly, the wages earned by one man cannot be due to another except under a contract. 3dly, If the magistrates had no jurisdiction under the act, the appeal of the plaintiff could not give them any; because a party may appeal upon that very ground, in order to relieve himself from further question or trouble by having the order quashed. Not even consent of parties can give jurisdiction where none is given by law (a). [Lord *Ellenborough* C. J. said that he might take that for granted: if there were no original jurisdiction in the magistrates making the order, the appeal would not give it.]

1806:

LOWTHER
against
The Earl of
RADNOR,
and Another.

In the course of the argument, both now and last term, the Court expressed great doubt how far in this form of action, which charged magistrates as trespassers for an act done by them in the exercise of their judicial capacity, they could take into consideration any other facts than those which appeared to have been laid before the magistrates at the time of the order made. And upon the present occasion Lord *Ellenborough* C. J. said that the facts stated in the case were not stated as facts appearing before the magistrates at the time; and that in order for the plaintiff to avail himself of them, it should have appeared that the same facts were stated to the magistrates, before whom he had notice to appear. For how otherwise, he asked, could the magistrates be affected as trespassers, if the facts stated to them upon oath by the complainant were such whereof they had jurisdiction to inquire, and nothing appeared in answer to contradict the first statement? *Grose* J. My doubt is, whether in this case we can take notice of any thing but what appears upon the face of the order. *Lawrence* J. If the magistrates made an order against the evidence laid before them, the party injured would have another sort of remedy against them. But here it appears that a certain complaint was made to them on oath, which, as it appears on the face of the order, is valid in law; and of this the plaintiff had due notice. If then he would

[119]

(a) *Rex v. Commissioners of Sewers, Somerset, 7 East, 80.*

1806.

LOWTHER
against
The Earl of
RADNOR
and Another.
[120]

complain of what was done upon it, he ought to have shewn that the facts on which he now relies were proved before the magistrates. But he cannot make them trespassers by shewing that the real facts of the case will not support the complaint unless such facts were proved before them at the time.

Dampier for the defendants. 1st, Upon the face of the order it appears that *Sopp*, a labourer, complained to the magistrates upon oath, that a certain sum due to him for wages was withholden from him by the plaintiff. What evidence was given before the magistrates is not stated; but as they adjudge the money to be justly due to *Sopp*, it must be presumed that he made good his complaint; and the plaintiff, though summoned, offered no contradiction to it. He then argued from the words of the statute 20 *Geo. 2. c. 19. s. 1.* that it extended in terms to labourers of all descriptions; and that the reason of the thing extended to them. *Labourers in husbandry* are not mentioned specifically; and yet the act is admitted to include them. The act only mentions *servants in husbandry*, between whom and labourers there is a distinction; for in the case of the former the magistrates have jurisdiction to the extent of 10*l.* but only of 5*l.* in the case of *labourers of any description*. And the stat. 31 *Geo. 2. c. 11. s. 3.* reciting a doubt whether the words in the former statute, "any labourers employed for any certain time or in any other manner," extended to *servants* in husbandry hired for a less time than one year, extends the provision to all *servants* in husbandry, though hired for less time than one year. It is a great advantage to this class of persons to have speedy and cheap justice administered at their own doors; and therefore so beneficial an act ought rather to be extended than confined by construction, and the policy of the law is to give effect to the general words. The reason why potters, glassmen, and others are particularly mentioned, might be, because some of those descriptions of workmen may not be considered as classing with *labourers*, commonly so called. 2dly. It is not inconsistent with the condition of a labourer that he should contract to do the work by the piece or great, and therefore should employ another labourer under him; many important operations in husbandry are performed in this manner; threshing, fencings, ditching, mowing, reaping. The digging and steaming of a well for cattle may well be done by a labourer in husbandry. As to the 3d point made by the plaintiff's counsel, he abandoned it

[121]

it on an intimation by the Court that the objection could not be supported.

Lord ELLENBOROUGH C. J. at the conclusion of the argument some days ago observed, that the construction of a statute of such general utility and extensive application, affecting the relief of the most numerous class of subjects by the magistrates in their daily practice, and making one of a body of laws upon the same subject, required to have the most mature consideration given to it, in order to make their decision conform, as much as the words of the act would admit, to the general policy of the law upon this subject. The Court would therefore deliver their opinion on another day. And now his Lordship gave judgment.

The question arising on this special case depends on the terms of the complaint made to the magistrates, as recited in the order of the two magistrates of the 27th of Nov. 1804; and how far the terms of that complaint bring the complainant within the provisions of the statute 20 G. 2. c. 19. The complaint is in these words, “Whereas *Jas. Sopp of Shrewton* in the county of *Wilts*, labourer, hath complained unto *John Thomas Batt*, Esq. one of H. M. justices of the peace in and for the said county of *Wilts*, that *G. Lowther*, Esq. residing at *T.* in the said county, had refused to pay unto him the said *J. S.* 4*l.* 13*s.* 6*d.* for wages justly due unto him for work and labour done by him the said *J. S.* and *T. Franklin*, in the service of the said *G. Lowther*, by digging and steaming part of a well at the said parish of *T.*” This complaint must be taken to be true in the terms of it; no evidence appearing to have been laid before the magistrates to contradict or vary it, and they having adjudged the same to be true. By this it appears that *Sopp* was a labourer, for he is described as *J. Sopp of Shrewton*, labourer; and that his demand was for wages due to him, for work and labour done by himself and another person, *Thomas Franklin*, by which must be understood that *Sopp* was employed to do the work either by the day or the piece, and that *Franklin* assisted *Sopp* in the work, under the retainer of *Sopp* and not of Mr. *Lowther*, a common practice with labourers as well in husbandry as in other business. Is *Sopp* then such a labourer as is by the stat. 20 G. 2. c. 19. subjected to the jurisdiction of the justices of the peace, and of course entitled to the benefit of that jurisdiction, to recover his wages, being under 5*l.*, by their

1806.

LOWTHER
against
The Earl of
RADNOR
and Another.

[122]

summary

1806.

—
 LOWTHER
against!
 The Earl of
 RADNOR
 and Another.

[123]

summary process? The stat. 20 G. 2. c. 19. begins by reciting that the laws now in being for the better regulation of servants, and for the payment of wages to them, and to artificers, handicraftsmen, and *labourers*, are insufficient and defective; and for remedy enacts, that all complaints, differences, and disputes which shall happen and arise between masters or mistresses and servants in husbandry who shall be hired for one year or longer, or which shall happen or arise between masters and mistresses, and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and *other labourers, employed for any certain time, or in any other manner*, shall be heard and determined by one or more justice or justices, although no rate or assessment of wages has been made that year by the justices. The stat. 31 G. 2. c. 11. s. 3. recites the stat. 20 G. 2. c. 19. and that doubts had arisen whether the words, "*any labourers employed for any certain time, or in any other manner*, extend to servants in husbandry hired for a less time than a year; and for obviating the said doubts enacts, that the said act, and every clause and matter therein contained, shall extend to all servants employed in husbandry, though hired for a less time than a year. In the argument of this case it was contended, that *Sopp* did not come within the meaning of the act of parliament 20 G. 2. c. 19., because he was not a servant in husbandry, nor a servant or labourer in any of the trades, callings, or employments enumerated in that act, and that the words used in the act, "*other labourers employed for any certain time, or in any other manner*," meant labourers in any of the enumerated trades only, and not labourers generally. With the first part of the argument, that he is not to be taken as a servant in husbandry, we agree; because he is not stated to be so in the order or complaint; and we cannot intend any thing to give the justices jurisdiction beyond what appears in the order. *Rex v. The Inhabitants of Hulcot*, 6 Term Rep. 583. But we cannot accede to the latter part of the argument, that the operation of the statute is to be confined to labourers in the several enumerated employments. The most obvious construction is not so to confine it; and no case has been stated where the construction has been so confined. The mischief recited in the preamble of the act is *general*, viz. that the laws in being for the better regulation of servants, and the payment of wages to them, and to artificers, handicraftsmen, and *labourers*, are insufficient.

1806.

—
 LOWTHER
against
 The Earl of
 RADNOR
 and Another.
 *[124]

insufficient. The remedy provided by the act is, that all* differences between masters or mistresses and servants *in husbandry*, who shall be hired for a year or longer: (These words certainly restrain the operation of the remedy, as to servants, to those in husbandry only, and to such as are hired for a year or longer: the act then proceeds,) “or (differences) which shall happen or arise between masters and mistresses and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, *and other labourers* employed for any certain time, or in any other manner.” Now unless these words, “*other labourers*,” mean to comprehend a different description of persons from those before particularly mentioned, it is difficult to account for their insertion at all; but applying them to *other labourers* in any other trade or business, the sense will be perfect, and each word will have its meaning. But it may be said, that if such an extensive construction be put on these last words of the sentence, the former part, specifying certain trades, becomes nugatory. That however will not follow; for artificers, handicraftsmen, miners, &c. do not necessarily or properly fall under the denomination of *labourers*; there being, as I take it, a known distinction between a journeyman in any art, trade or mystery, or other workmen employed in the different branches of it, and a *labourer*. It does not appear to us to be an objection to this construction, that by other acts of parliament passed subsequent to the 20 G. 2. workmen or labourers in other particular trades or manufactures, or labourers generally, are subjected to certain regulations which appear to clash with some of the provisions of this act. As the stat. 22 Geo. 2. c. 27. s. 9. for regulating certain manufactures therein mentioned; and the stat. 6 Geo. 3. c. 25. for the better regulating apprentices and persons working under contract; and other statutes which may be pointed out. The true answer seems to be that at the time of passing one act, the legislature has not always had every other act containing provisions bearing on the same subject brought under its consideration. The act now under our consideration appears to have had for its object the affording to certain servants and workmen, and to labourers in general, a speedy, easy, and cheap mode of recovering their wages when they amount to a small sum; and to masters an easy method of correcting trifling misdemeanors and ill behaviour in their workmen and labourers.

These

[125]

1806.

—
LOWTHER
against
The Earl of
RADNOR
 and Another.

These benefits are by the words of the act extended to servants in husbandry, to workmen in different branches of trade, and to other labourers employed for any certain time or in any other manner. The latter words are as general as may be; and we cannot find any reason in law or policy to say that they do not comprehend the case of *Sopp*, as stated in the order of the two magistrates. For these reasons we are of opinion, on the questions submitted to us by the special case, that the justices making the original order had jurisdiction to make that order; and of course that the quarter sessions had jurisdiction to make the order on the appeal. The consequence is, that the postea must be delivered to the defendants.

[126]

Thursday,
Nov 27th.

EARLE and Others *against* ROWCROFT.

Barratry is any fraudulent or criminal conduct against the owners of ship or goods by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners; although it may not be done with intent to injure them, or to benefit at their expence the master or mariners. And therefore, where

THIS was an action on a policy of insurance, dated 28th *January* 1804, on the ship *Annabella*, at and from *Liverpool* to the coast of *Africa*, during her stay and trade there, and to the port of sale in the *West Indies*, with liberty to exchange goods, &c.; and the plaintiff averred a loss by barratry of the master. It appeared at the trial at *Guildhall*, that the master, who was also supercargo, on his arrival off *Cape Coast Castle*, a *British* settlement on the coast of *Africa*, let go an anchor, and began to trade there for two days; but receiving intelligence that he could barter his goods for slaves more expeditiously and advantageously at *D'Elmina*, a *Dutch* fort about 7 miles to windward, he weighed anchor and proceeded to this latter place, which had the *Dutch* flag flying and guns mounted, where he exchanged his goods, consisting, amongst other things, of muskets and gunpowder, with the *Dutch* governor and another resident there, for slaves: *Holland* being at that time at war with *Great Britain*, and he having a letter of marque on board against the *French* and *Dutch*. After taking on board a number

a master had general instructions to make the best purchases with dispatch, this would not warrant him in going into an enemy's settlement to trade (which was permitted by the enemy) though his cargo could be more speedily and cheaply completed there; but such act, in consequence of which the ship was seized and confiscated, is barratrous.

of

1806.

 EARLE
 against
 ROWCROFT.

of slaves, the captain, who was then on shore at *D' Elmina*, receiving information that an *English* frigate was in sight, sent a note on board the *Annabella*, directing her to sail immediately from thence to *Cape Coast*, to prevent, as he expressed himself, mischief; but before she reached the latter place she was pursued and captured by the *English* frigate, and sent to *Jamaica*, where she was condemned as prize, for having traded with the enemy. It appeared further, that it had been usual to keep up a trading intercourse, in boats and small craft, between the *English* and *Dutch* settlements on this part of the coast, even in times of war between the mother countries; and that the captain's object in going to *D' Elmina* was to complete his cargo as cheaply and expeditiously as he could. It was admitted that he had no particular instructions to go there, but that he was directed generally to make the best purchases with dispatch. It was also in proof, that when the ship was about to go to *D' Elmina*, the surgeon asked the captain if there was no impropriety in going there; to which he answered that they should be gone soon and nobody would know it. And also that besides his usual pay as captain, he had a commission on purchases and sales, which he was entitled to receive at the end of the voyage. Lord *Ellenborough* C. J. was of opinion, that this trading with the enemy by the captain, without the authority of his owners, though intended principally for their benefit, being in contravention of his duty to them, and subjecting their property to confiscation, was barratry; on which the plaintiff was entitled to recover in this action: but the case being new in specie, his Lordship gave the defendant leave to move the Court to set aside the verdict for the plaintiff and enter a nonsuit. A rule nisi was accordingly obtained for that purpose early in the term; against which

Sir *V. Gibbs*, *Park*, *Topping*, *Marshall* Serjt. and *Scarlett*. shewed cause, and contended that the act of the captain, in going to trade at an enemy's settlement, unauthorized as it was by his owners, and illegal in itself, thereby subjecting their property to seizure and confiscation, though intended for their benefit as well as his own, was barratrous. That the act of trading with an enemy, and going into his port for that purpose, is illegal, and subjects the ship and cargo to confiscation, cannot be disputed; and the sale of arms and ammunition to them does not lessen the illegality. And no continuation or repetition
 of

[127]

[128]

1806.

—
EARLE
against
ROWCROFT.

of such illegal practices can render them less unlawful. This the captain was bound to know. Besides which, there is evidence in the case to shew that he was conscious at the time of the risk his owners were incurring by his misconduct. Next the act was unauthorized by the owners. Nothing short of their positive directions to go to *D' Elmina* could excuse him as to them. It was not enough that he had a discretion given to him to trade where he thought best on the coast, and instruction "to make the best purchases with dispatch;" for that must mean *legal* purchases and *legal* dispatch. [Lord *Ellenborough* C. J. Certainly it must be so considered.] Then an illegal act by a captain of a ship, unauthorized by his owners, and contrary to his duty to them, by which he exposes their property to confiscation, is criminal and barratrous as against them: although, if successful, it might have been advantageous to them, as well as to himself. For it is not necessary to constitute barratry that the immediate object of the captain should be to benefit himself at the expence of his owners. This appears from all the text writers (a), and cases upon the subject. In *Knight v. Cambridge* (b), it was decided (as appears from later cases (c), (for that point is not stated in the printed reports of the case,) that the sailing out of port, without paying duties, whereby the ship was subjected to forfeiture, was barratry: and yet that could only have enured, if successful, to the benefit of the owners, and not of the master. But in *Stamma v. Brown* (d), from whence a contrary doctrine may at first sight appear to be deducible, the act complained of, namely *deviation*, was ambiguous in its nature, and might have been done innocently or ignorantly, and not with a fraudulent intent, And therefore in ascertaining such intent it might be proper to inquire whether or not the deviation were intended for the masters' or owners' benefit. And the same explanation is given by Lord *Mansfield* of the case of *Elton v. Brogden* (e), in *Vallejo v. Wheeler* (f): the act of deviation namely, the returning

[129]

(a) Vide *Park on Insur.* ch. 5. and *Marshall*, b. 1. ch. 13. s. 6. and the authorities cited.

(b) 1 *Stra.* 581. 2 *Lord Ray.* 1349. 8 *Mod.* 230.

(c) Vide *Stamma v. Brown*, 2 *Stra.* 1174. and the MS. note of that case afterwards referred to; and *Vallejo v. Wheeler*, *Cowp.* 153.

(d) 2 *Stra.* 1173.

(e) 2 *Stra.* 1264.

(f) *Cowp.* 154.

1806.

 EARLE
 against
 ROWCROFT.

into port a second time upon the capture of a second prize) was shewn not to be barratrous, being done for the benefit of the owners. In this case, however, there is no necessity for adverting to the criterion of intent; because the act, which was wilful, is in itself illegal, and necessarily injurious to the owners. Mr. Justice *Buller*, in *Saloucci v. Johnson* (a), had no doubt that if the resistance of a neutral ship to be searched by a belligerent were a breach of neutrality,) which has since been so determined in *Garrels v. Kensington* (b), it would be an act of barratry; being contrary to the master's duty: and yet it is plain that the master's motive could only be to serve his owners. And no doubt that the breach of an embargo would be barratry; though it was unnecessary to decide that point in *Robertson v. Ewer* (c); as smuggling has since been holden to be in *Havelock v. Hancil* (d). Next, however, to the case of evading the port duties, they relied principally upon *Moss v. Byrom* (e), as governing the present case. There a ship, having taken out a letter of marque (but without a certificate, which is necessary to its validity) merely to encourage seamen to enter, and without any intention of using it to cruize; the captain, contrary to his instructions, cruized for and took a prize; and his ship was afterwards lost, in consequence of his following the prize into *Burmuda*. This was contended not to be barratry, because the capture was made for the benefit of the owners, which was evinced by the prize being libelled in their, as well as the captain's, name: But the Court thought that made no difference; and that the act, being contrary to the captain's duty to his owner, was barratry. The principle and judgment of that case are not at all impeached by that of *Phyn v. The R. Ex. Ass. Comp.* (f), or by what was there said in explanation of the former case: for the circumstances of the former, as well as of the present case, fall in with the definition of barratry relied on in *Phyn v. The R. Ex. Ass. Comp.* given from the MS. note of *Stamma v. Brown*, namely, that it is "a breach of trust in the master *ex maleficio*;" and therefore it was holden that a devia-

[130]

(a) *B. R. Tr.* 25 *G.* 3. *Park on Insur.* ch. 18. near the conclusion.

(b) 8 *Term Rep.* 250.

(c) 1 *Term Rep.* 129.

(d) 3 *Term Rep.* 277.

(e) 6 *Term Rep.* 379.

(f) 7 *Term Rep.* 508.

1806.

EARLE
against
ROWCROFT.
[131]

tion through mere ignorance would not be barratry. And this falls in with the distinction before taken between acts of the captain in themselves illegal, and necessarily subjecting the property of his owner to hazard; such as the making prize in the former case, without lawful authority, and the trading with an enemy in the present case; and acts which are in themselves ambiguous, such as deviation, where evidence of intent may be let in to explain them. In *Moss v. Byrom*, as in this case, the captain sought a benefit to himself through the medium of an act, which, if it succeeded, necessarily benefited his owners also; but in both cases he risked the whole of his owner's property, while his own risk was comparatively small: and whatever his motive might be, which it would be difficult to prove, the act itself was a public offence, and necessarily injurious to his owners, and therefore comes within every definition of barratry.

Garrow and *Marryat*, contra. All the books agree that barratry imports fraud and crime in the master or mariners against their owners. The act must be a breach of trust, and done ex maleficio, or malo animo. There is no case, as was said in *Phyn v. The R. Ex. Ass. Company (a)*, which says that an act is barratrous, merely because it is against the interest of the owners, *unless it be done with a criminal intent*; and such an intent is necessarily implied in the very definition of barratry. How then can it be applied to this case, where the obvious motive of the act was to make the cheapest and speediest purchases for his employers? for the benefit to himself from expediting the voyage bore no comparison to theirs: what he gained in receiving his commissions sooner would in part be balanced by receiving so much less wages reckoned by time. Besides, the going into *D'Elmina* was not done by him, as master, for any purpose of navigation, but, as super-cargo, for commercial purposes. Admitting that the going into an enemy's port for this purpose might not be warranted by the legal import of the captain's instruction; yet if he erred through mistake, and intended to promote his owner's interest, it will be a crime as against those owners. And though the usage of the trade will not legalize the act, it serves to shew quo animo it was done. The arms and ammunition were not sold to the

[132]

(a) 7 Term Rep. 508.

1806.

EARL
against
ROWCROFT.

Dutch for the purpose of hostility, but as the common articles of barter with the natives of the country for slaves. All the cases, which shew that deviation, unless made with intent to prejudice the owner, is not barratry, apply to this case: For some benefit is derived to the captain even from the protraction of the voyage. It is not enough that the act is illegal, unless the *malus animus* be specially directed against the owner. If the captain were guilty of murder, &c. upon a collateral occasion, whereby a prejudice ensued to his owner, that would not be barratry. In *Moss v. Byrom* the captain's act was that of a pirate and robber, done in direct contravention of the order of his owner, and of the charter-party under which he was sailing: But this was at most a mere error in judgment. And the supposed generality of the doctrine laid down in the former case was corrected and explained in *Phyn v. The R. Ex. Ass. Company*. The only case, which bears at all the other way, is that of the evasion of the port duties; of which there is a very imperfect account: and non constat with what intent the attempt was made.

Lord ELLENBOROUGH C. J. As the question raised involves in it the nature and definition of barratry in general, the Court will look into the cases, and particularly that of the port duties, if any further information can be obtained of it before they deliver their opinion. But I cannot refrain from making a few observations at present upon the argument which has been urged. It has been asked, how is this act of the captain in going to *D'Elmina*, in order to purchase the cargo for his owners cheaper and more expeditiously, a breach of trust, as between him and them. Now I conceive that the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners where they give any: and where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage; because in the absence of express orders to the contrary, obedience to the law is implied in their instructions. Therefore the master of a vessel, who does an act in contravention of the laws of his country, is guilty of a breach of the implied orders of his owners. I cannot, therefore, for a moment suffer it to be supposed that a captain is not guilty of a breach of trust to his owners, who, in contravention of the law, the observance of which, nothing being

[133]

1806.

expressed to the contrary, is implied in their orders, does an act which is injurious to them.

EARLE
against

ROWCROFT.

His Lordship, a few days afterwards, delivered the judgment of the Court.

[134]

The question in this case is, whether a loss of a ship incurred by an illegal act of the master, not authorised by his owners, in going into *D'Elmina*, a Dutch and enemy's port on the coast of *Africa*, and trading there for slaves by a barter of arms and warlike stores, on account of which illegal traffic the vessel insured was seized by a king's ship, and afterwards condemned in the *West Indies*, be barratry; or whether, as contended on the part of the defendant, in order to constitute barratry, the act should not appear to have been done with a view of promoting the master's benefit to the prejudice of his owners. It is extraordinary that this species of loss, occasioned by the misconduct of the master, selected and appointed as he is by the owners themselves, and liable to be dismissed by them only, should ever have been made the subject of insurance: and it is the more so, as it has an impolitic tendency to enable the master and owners, by a fraudulent and secret contrivance and understanding between themselves, to throw the ill success of an illegal adventure, of which the benefit, if successful, would have belonged solely to themselves, upon the under-writers. So, however, it is, that this description of loss has, from the earliest times, held its place, as a subject of indemnity, in *British* politics of insurance. The original meaning of this term is to be collected from the *Italian* language, and is, according to *Dufresne's Glossary*, verbum Barratria, "*fraus, dolus, qui fit in Contractibus et Venditionibus.*" He does not apply it in any marine sense, or with reference to the particular relation of master and owners. In that sense, however, in which it is peculiarly used, as applied to subjects of *British* marine insurance, in the earliest reported case which we find on the subject, it is considered as being precisely tantamount to *fraud*, in the particular relation which subsists between master, mariners, and owners; being such by which a loss may happen to the subject matter insured. In *Knight v. Cambridge*, 1 *Str.* 581. where the breach was assigned on a loss "*per fraudem et negligentiam*" of the master; and where it was objected, in arrest of judgment, that the fraud and negligence of the master were not within the policy, being more general than the word *Barratry*; *Raymond*

1806.

 EARLE
 against
 ROWCROFT.

mond J. in the report of the same case in 8 *Mod.* 231. held that "per fraudem AUT negligentiam would not have been good (a)." So that the *negligence* was considered as immaterial, and the *fraud* as being the substantial matter constituting the barratry. And the Court (in the report in *Strange*) held that negligence was not within the policy, but that fraud was. Now as no limitation is put upon that term in the record in *Knight v. Cambridge*, we must understand the Court as holding that fraud and barratry were in effect words of co-extensive import; that is, that barratry included *every species of fraud* in the relation of the master to his owners, by which the subject matter insured might be endangered. The particular manner in which the loss was in that case occasioned does not appear in any of the reports of it either in *Strange*, Lord *Raymond*, or 8 *Modern*. But a MS. note of Mr. *Ford* of the argument in *Stamma v. Brown*, in referring to the case of *Knight v. Cambridge*, and describing the question in that case upon the record, and stating that "fraud was barratry," adds, "*if the master sail out of the port without paying port duties, whereby the goods are forfeited, lost, or spoiled, that is barratry (b):*" (and which probably was the question of fact decided at the trial, or upon a case in the Common Pleas.) And from what is said of the facts of *Knight v. Cambridge*, in *Vallejo v. Wheeler*, *Cowp.* 153. both by counsel and by Lord *Mansfield*, it was a case in which the captain, whose duty it was to have paid the port duties before the ship went out of port, had not done so; and is therefore most probably the same case as is alluded to by Lord C. J. *Lee*; in *Stamma v. Brown*, 2 *Stra.* 1174. where he compared the case then in question "to the case of a sailing out of port, without paying duties, whereby the ship was subjected to forfeiture; and which had been, he says, holden to be barratry."

[136]

(a) This is stated in the margin of the 2d edition of the 8th vol. of *Mod. Rep.* in 1769. Vide the preface to that edition; but it is not in the 1st edition of 1730, nor in the last, the 5th edition of 1795. The concluding sentence of the case, as it stands in the edition of 1730 (which is not to be found in the two other editions, I have referred to) is as follows, "And they, (the whole Court,) all agreed that fraud is barratry, though negligence might not: So the judgment was affirmed."

(b) The same account of the case of *Knight v. Cambridge* is given by the counsel on both sides in the MS. argument of *Stamma v. Brown*.

1806.

—
EARLE
against
ROWCROFT.

In a MS. note of the case of *Stamma v. Brown*, which was read to us by my Brother *Lawrence*, Lord C. J. *Lee* defines barratry as being, "some breach of trust in the captain *ex maleficio*." And in the note of the same case with which I have been furnished from Mr. *Ford*'s MS. Lord C. J. *Lee* says, "barratry must be *ex maleficio* with intent to destroy, waste, or "embezzle, the goods; (that, it must be remembered, was a "policy on goods,) and therefore although this might be a deviation, yet I do not see how it can be considered as barratry. "I make no question that there may be such a deviation as will "amount to barratry; as where the master deviates to burn, "sink, destroy, or throw the ship into the enemy's hands; or "where *he has benefit by the deviation*; as if he himself had "insured the goods: and therefore it was a material part of "the case, whether the master had any *benefit* by this alteration "of the voyage; for that might have been *evidence of fraud* "in him, &c." Of course he did not consider the benefit of the master as a necessary ingredient in the constitution of barratry in all cases, but only as a pregnant circumstance to prove the existence of such a fraud in point of fact, in a particular case. In *Nutt v. Bourdieu*, 1 Term Rep. 323. Lord *Mansfield* defines barratry nearly in the same terms, viz. as partaking of something criminal, and as committed against the owner by the master or mariners. And Lord *Hardwicke*, in *Lewen v. Suasso* (a), had before defined it to be "an act of wrong done by the master against the ship and goods." Willes J. in giving the judgment of the court in *Lockyer v. Offley*, 1 Term Rep. 252. a case decided just before that of *Nutt v. Bourdieu*; and upon which occasion he must be understood as speaking in conformity with the opinion upon this point of Mr. Justice *Buller*, who was then present; and probably after some communication on the subject with Lord *Mansfield* also, who happened then to be absent; defines barratry as including, "every species of fraud or knavery of the master of the ship, by which the freighters or owners (the freighters in that case were owners pro tempore) are injured." And in *Vallejo v. Wheeler*, Cowp. 155. Aston J. after stating that the conduct of the master was clearly barratry, adds, as the reason which induced him to form that conclusion, "for he was acting *for his own benefit*, without intending any good to his owner, and without his consent and

(a) *Posteth*, 147. tit. *Assurance*.

privity."

1806.

EARLE
against

ROWCROFT.

privity." Here considering, as Lord C. J. Lee had done before in *Stamma v. Brown*, the circumstance of private benefit accruing to the master as *evidence of fraud* in him in the particular case, and not essential to its constitution in all cases whatever. And he adds afterwards, "I am clearly of opinion that this change of the voyage *for an iniquitous purpose* was barratry; which is not confined to the running away with the ship, "but comprehends *every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured*. He does not add, "*and by which the master is benefitted*;" which he must have done if he had considered the actual or intended benefit of the master as essential to the definition of barratry. In *Robertson v. Ewer*, 1 Term Rep. 127. Buller J. upon the trial, was of opinion, and it does not appear upon the argument to have been denied by the Court, that *sailing out of port* without leave, *in breach of an embargo*, in consequence of which the owners afterwards sustained a loss, in respect of seamen's wages and provisions, by the detention of the ship, was barratry. The only question made by the Court was, whether a loss of this kind were recoverable on a policy upon the body of the ship. And although it was urged in argument for the defendant, that what was done by the master *had been intended for the benefit of the owners*, the Court did not advert to it as a point at all material to the decision of the question. In *Moss v. Byrom*, 6 Term Rep. 379. where a master, under letters of marque defective in point of validity for want of a certificate, and which had been put on board by the owners with a view to encourage seamen to enter, and without any intention of their being used for the purpose of cruising, had cruized for and taken a prize, and had afterwards libelled such prize for condemnation in the name of himself and his owners, in a port in the *West Indies*, and during his stay there on that occasion was lost: this was holden by Lord Kenyon and the rest of the Court to be barratry. After these various decisions of courts of law, we are certainly warranted in pronouncing that a fraudulent breach of duty by the master in respect to his owners; or, in other words, a breach of duty in respect to his owners, with a criminal intent, or *ex maleficio*, is barratry. And with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers be

[138]

[139]

1806.

EARLE
against

ROWCROFT.

owing to an act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master's duty to obey, and which (or it would not be barratry) his owners relied upon his observing. It has been strongly contended on the part of the defendant that if the conduct of the master, although criminal in respect of the state, were in his opinion likely to advance his owner's interest, and intended by him to do so, it will not be barratry. But to this we cannot assent. For it is not for him to judge in cases not intrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavours to advance the interest of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, not only from what ought to be, and therefore must be presumed to have been, their own sense of public duty, but also from a consideration of the risk and loss likely to follow from the use of such means. In laying down this doctrine we feel ourselves supported by the several eminent authorities already referred to. And in giving this opinion we do not feel any apprehension that simple deviations will be turned into barratry, to the prejudice of the under-writers; for unless they be accompanied with fraud or crime, no case of deviation will fall within the true definition of barratry, as above laid down.

[140]

Another argument was used, which hardly appears to have been used seriously; namely, that the captain in this case united in himself the two characters of super-cargo and captain; and that as captain he must be considered as obeying the directions of his owners, giving to himself, the captain, by himself in his character of super-cargo. It is sufficient to state such an argument, to shew that it can have no weight. The directions of the owners as to the conduct of the voyage, and as to places where the trade was to be carried on, are to be looked for in their instructions; which coupled with their duty to their country, must, during every moment of the voyage, be considered as either expressly or impliedly directing the captain to conduct the ship to those places only where trade might be carried on without violating the laws of their country. For these reasons we are of opinion, that the rule nisi, which has been obtained in this case, must be discharged.

1806.

DOE, on the several Demises of NATHANIEL BATES, *Friday,*
and ANN his Wife, *against* CLAYTON and Another. *Nov. 28th.*

IN ejectment for lands in *Little Eaton*, in the county of *Leicester*, tried at *Leicester*, before *Chambre, J.* a verdict was taken for the plaintiff, subject to the opinion of the Court upon the following case.

Thomas Wright, being seised in fee simple of the premises in question by will duly executed, dated the 25th *July* 1795, devised as follows: "And as for my worldly and temporal estate which it has pleased God to endow me with, I dispose thereof in the following manner. First, I give and bequeath unto *Nath. Bates*, 1s. at the time of my decease or when called for: and I further devise that the aforesaid *N. Bates* shall not come upon my premises or hereditaments on any account whatsoever. I also give, devise, and bequeath unto my grandson *Matthew Bates* 400*l.* to be paid at the age of 21 years: 100*l.* of it is now in security by bond from my wife's nephew *J. Clayton*, which was part of my wife's portion; and the other 300*l.* arising from the profits of my estate and * money at interest. I also give, devise and bequeath to my daughter *Ann* 20*l.* per annum, during the term of her natural life, to be paid half-yearly out of the profits of my estate or lands at *Eaton*." And then after some specific legacies of plate and furniture, and bequeathing the residue of his household goods,

One seised in fee, having only one daughter *A.* married to *N. B.* and two grandsons *W. T. B.* and *M. B.* devised, "as for my worldly and temporal estates, &c. I give to *N. B.* 1s.; and devised that, he shall not come upon my premises or hereditaments on any account whatsoever. Then after giving a legacy to his grandson *M. B.* he devised to his daughter 20*l.* a year out of the profits of his ES-

TATE or lands at *Eaton*:" and then devised to his grandson, *W. T. B.* "all his messuage and dwelling-house situate at *Eaton* aforesaid, with all their hereditaments, &c. thereunto belonging, &c. and that *W. T. B.* when 21, shall enter upon and enjoy the above-mentioned ESTATE, situate at *Eaton* aforesaid: but that if he should leave his profession, all his right and title to the estate devised shall devolve and descend to his brother *M. B.*" Held that in order to effectuate the intention of the deviser to exclude, at all events, his son-in-law *N. B.* from coming upon his premises, &c. (which he would otherwise be entitled to do as tenant by the curtesy, if his son *W. T. B.* died before his mother;) *W. T. B.* took a fee. Aided too, as that construction was, by the introductory words as to his worldly estate; by giving *N. B.* 1s.; by the annuity for life to his daughter, payable out of the same estate: and from the direction for the estate to descend and devolve to *M. B.* if his elder brother *W. T. B.* should leave his profession; (in which event *M. B.* would only have taken *pur autre vie*.) But held that the annuity devised to his daughter *A.* out of the profits of the estate, being no charge upon the devisee, or upon the estate given to him, would not have passed the fee to *W. T. B.*: nor would the word estate, as here used in the devise to him; being by reference restricted to the antecedent words.

1806.

—
DOE d.
BATES
against

CLAYTON
and Another.

with his books, &c. between his two grandsons *Wright Thomas* and *Mathew Bates* equally; he says, "And I do hereby give, devise and bequeath unto my grandson *Wright Thomas Bates*, all that messuage and dwelling-house situate at *Eaton* aforesaid, with all houses and hereditaments thereunto belonging, and also, all those parcels of land situate in the lordship, precincts, and territories of *Eaton* aforesaid, now in my own and *Geo. Blankley's* occupation, and to continue so until *Michaelmas* 1801. And my will further is, that my grandson *Wright Thomas Bates*, when he arrives at the age of 21 years, shall enter upon and enjoy the *abovementioned* ESTATE, with the hereditaments thereto belonging, situate at *Eaton* aforesaid. And my will further is, that if my grandson *Wright Thomas Bates* should make an error and run away from his profession that he is now settled in, all his right and title and claim to the *estate* of lands and houses that I have now devised to him shall devolve and *descend* to his brother *Mathew Bates*. And I do hereby make and ordain my grandson *Wright Thomas Bates*, upon his good behaviour, to be my sole executor." The premises above devised are the premises in question. The testator died scised in *November* 1797, leaving only one child *Ann*, one of the lessors of the plaintiff, and who had been married many years to *Nath. Bates*, the other lessor of the plaintiff, by whom she had two children, *Wright Thomas* and *Mathew Bates*. The testator died possessed of personal assets sufficient to pay his debts and the legacy of 400*l.* bequeathed to his grandson *Mathew*, and the several other legacies. *Ann Bates* had for several years previous to and at the time of the death of the testator, together with her two children lived apart from her husband and with the testator, at whose expence they were maintained and the children educated. *Wright Thomas Bates*, at the time of his grandfather's making his will and until his decease, was an apprentice to an apothecary, and complied with the terms of the will in every respect, and continued in his profession conformably thereto. Upon his attaining the age of 21, he entered upon the estate and premises so devised to him, and enjoyed the rents and profits thereof till the time of his death without issue, in *June* 1802. And by his will duly executed, dated 25th of *March* 1802, *W. T. Bates* devised the estate in question, together with his personal estate, to the defendants, in trust to convert the same into money, and after payment of his debts and funeral expences to place the money out at interest

and

[143]

and pay such interest to the sole use of his mother for the maintenance of herself and her son *Mathew* until the latter should attain the age of 21 years; then to pay *Mathew* 100*l.* in addition to the 400*l.* left him by his grandfather; continuing the remainder at interest for his mother during her life, and then to pay the principal to his brother *Mathew*. The question was, whether *Wright Thomas Bates* took a fee in the estate in question, under the will of his grandfather *Thomas Wright*, or only an estate for life? If the latter, the verdict to stand: if the former, the verdict to be entered for the defendants.

1806.

DOE d.
BATES
against
CLAYTON
and Another.

The case was argued on a former day by *Reader* for the plaintiff, and *Torkington* for the defendants; but as the arguments turned wholly on the intention of the devisor, to be collected from the particular provisions of his will, and are adverted to in the judgment of the Court, they need not be repeated. After time taken for consideration,

[144]

LORD ELLENBOROUGH C. J. delivered judgment.—‘The question is, whether, by the will of *Thomas Wright*, his grandson *Wright Thomas Bates* took an estate in fee, or for life only; inasmuch as in the devise to him there are no words of limitation, without which a fee will not pass, unless there be other words in the will to shew the testator’s intent to pass a fee, or unless the devise be for some special purpose, which cannot be effected without a larger estate than an estate for life? The introductory clause of the will, it is admitted, is not sufficient of itself to pass a fee: nor will the annuity given to the testator’s daughter of 20*l.* a year, for her life; as it is given *out of the profits of the estate*, and is no charge on the devisee, or on the estate given to him. And though the word *estate* be used (which in most cases will carry the whole interest which a testator has,) yet, as it is in this case by its reference restricted to the antecedent words of devise, it cannot pass a fee, as those antecedent words will not do so. It is then to be seen whether in order to *effectuate the views of the testator*, as collected from his will, it be necessary to give such estate. The objects which he had in view, seem to have been, first, the exclusion of his son-in-law from any advantage from his estate, of which he would have been tenant by the curtesy if it had been permitted to descend to his daughter: and, secondly, to prevent his grandson *Wright Thomas Bates* from deserting the business in which he was engaged, and which he might be induced to leave, if an unqualified right in the tes-

[145]

tator’s

1806.

—
DOE d.
BATES
against
CLAYTON
and Another.

tator's estates were given him. These appear to have been the testator's objects, from the legacy of one shilling given to his daughter's husband; from the testator's desire that the husband should not come upon his premises or hereditaments on any account whatever; from his giving his daughter an annuity of 20*l.* a-year during the time of her natural life, payable out of the profits of his lands or estate at *Eaton*; and from his direction that if his grandson *Wright Thomas Bates* should make an error, and run away from his profession, his right, title, and claim to the estate of lands and houses devised to him should descend and devolve to his brother *Mathew Bates*. Let us then see if for these purposes it be necessary that the grandson *Wright Thomas Bates* should take a fee. And to induce him to continue in his profession, it does not seem necessary that he should: for the loss of the estate for his life, and the depriving him during that period of the advantages of it, (the enjoyment of which might lead him to think the pursuit of his profession to be no longer an object,) might very effectually answer that purpose of the testator, who might not mean that *Wright Thomas Bates's* children should have no advantage from his, the testator's estates, in case their grandmother, the testator's daughter, should let it descend to them; although their father might make an error, and run away from his profession. The removing of that, which in the apprehension of the testator might operate as an inducement to him to quit his profession, during the whole time it was capable of being exercised, and the leaving him under the same necessity to carry it on as was the occasion originally of his being placed in it, might very reasonably be thought by the testator a sufficiently powerful security for his grandson's continuing in it; although in the event of his surviving his mother the reversion in fee might come to him. So that it does not seem necessary, for the purpose of accomplishing the latter object of the testator to give to *Wright Thomas Bates* more than an estate for life, determinable on his running away from his profession; with a limitation to *Mathew Bates*, in that event, of an estate for the life of his brother. And this is the natural construction of the devise to *Mathew Bates*, which furnishes no inference that the estate before given was meant to be more than an estate for life: for it refers to what was before given to his brother: and the testator does not seem to have had any particular reason for limiting his, *Wright Thomas Bates's* estate to *Mathew Bates*, except for the purpose of obliging

[146]

obliging his eldest grandson to continue in his profession. But, with respect to the other object of the testator, viz. that of excluding his son-in-law from any advantage from his estates, it does not appear to us that this object can be sufficiently answered, unless the grandson *Wright Thomas Bates* took an estate in fee; inasmuch as in the event which has happened, namely, of *Wright Thomas Bates's* dying in the lifetime of his mother, (and that was an event not so unlikely, as not to have been probably contemplated by the testator,) the lessor of the plaintiff, *Nathaniel Bates*, would, as he now insists, be entitled to the lands devised as tenant by the curtesy, if his son *Wright Thomas Bates* took only an estate for life. The testator appears to have considered his will as giving to his devisee a power of preventing his son-in-law from coming upon his estates; for he desires that he shall not come upon his premises and hereditaments on any account whatsoever; which request could only operate by being addressed to some person, who might have the power of preventing him from coming upon those premises and hereditaments, and could only operate for so long time as such person had that power. And therefore if the devisee, *Wright Thomas Bates*, took but an estate for life, on his death this object of the testator would be no longer attainable; and he, whom the testator desired might not come upon his premises on any account whatsoever, would by law be entitled to a freehold in them, and to enter and take possession of them. This the devisor could never mean: for there is no reason to think it was his wish to prevent his coming on the estate during the life only of the grandson; but that he should not at any time *during his own life* come upon it; and therefore, to give effect to that devise, the devisee must have been intended to take an estate commensurate with that desire; and as an estate for life would not be adequate to such purpose, it follows that the devisee must have been intended to take a fee. This construction may be considered as in a degree aided by the introductory words of the will respecting his worldly and temporal estate, &c. which are allowed to have some weight in cases where the intent of the testator is doubtful, and where there are other words in the will to carry his intent into effect; and also by the devise to his daughter, who was his heir at law, of an annuity for her life out of the profits of his estates. For it is highly improbable, when he made a partial provision for her life out of his estates, that he should mean that she should

take

1806.

DOE d.
BATES
against
CLAYTON
and Another.

[147]

1806.

DOE d.

BATES

*against*CLAYTON
and Another.

*[148]

take the whole of them upon the death of his eldest grandson ; an event which cannot well be understood to have put an end to the reasons or motives which induced such particular disposition of his property : and we have no reason to think that the deviser meant to have dealt more favourably * by his son-in-law in the event of his grandson's death, than he expressly did when his grandson was living. For these reasons we are of opinion, that the grandson *Wright Thomas Bates* took an estate in fee, and that the postea must be delivered to the defendant.

Postea to the Defendant.

Sir OSWALD MOSLEY, Bart. an Infant, *against* W. MASSEY, Sir J. P. MOSLEY, Bart. and Others, Infants, &c.

1806.

THE Lord Chancellor sent the following case for the opinion of this Court.

In the year 1758 *John Hope* Esq. died seised in fee of freehold estates in the counties of *Monmouth*, *Radnor*, and *Northumberland*, which on his death descended to his three coheirs at law, who were *Mary Jones* widow, *Thomas Tonman* Esq., and *Hannah Jones*, wife of *Thomas Jones* Esq. By indentures of lease and release dated the 5th and 6th of *January* 1762, being a settlement made previously to the marriage of *T. Tonman* with *Dorothy Roberts*; after reciting that *T. Tonman*, as nephew and one of the heirs at law of *John Hope*, was seised in fee of one undivided third part of certain manors, lands, &c. late the estate of *John Hope*, in the several counties of *Northumberland*, *Monmouth*, and *Radnor*; and that it was agreed that a division of all the real estates of *John Hope* * should be made, and that after such division the third part allotted to *T. Tonman* should be conveyed to trustees for the uses after mentioned; it was covenanted and agreed that *T. Tonman* should settle his allotment

A. having an estate in the county of *Monmouth*, of which he was seised in fee in possession, and another estate in the county of *Radnor*, of which he was also seised in fee, subject to the uses of his marriage settlement; (by which he covenanted to convey to the use of himself and his wife for life, remainder to his first and other sons in tail;)

which left him in equity a disposing power over the reversion only; both which estates had formerly belonged to an uncle, and came to him, the one by descent, the other by purchase from another co-heir of his uncle; by his will, misreciting the estate of which he was seised in fee in possession to be in the county of *Radnor* instead of *Monmouth*; and misreciting his disposable reversion to be in the county of *Monmouth* instead of *Radnor*, devised his estate so misdescribed to be in *R.* which was in truth the reversionary estate, to his wife for life; remainder to his only son for life; remainder to his sons and daughters in tail, in strict settlement; remainder to his own daughter, &c.; and devised the reversion only of his estate so misdescribed to be in *M.* of which, in truth, he was seised in fee absolute, after the deaths of his wife and only son without issue, to his daughter, &c.: yet held, that enough appeared on the face of the will, which also described these estates as *formerly belonging to his uncle*, to shew that the devisors intent was to pass the present interests of his estate in fee absolute, which was in the county of *M.* and the reversion of his settled estate in the county of *R.* although he had respectively misdescribed their local situations.

* [150]

of

1806.

MOSLEY
against
MASSEY.

of the said manors and lands, &c. to the use of himself for life; remainder to trustees for preserving contingent remainders, &c.; remainder to the use of *Dorothy* his intended wife for life, for her jointure and in satisfaction of dower; remainder to the use of the first and other sons of the marriage successively in tail; remainder to the use of himself, *T. Tonman*, in fee. By indentures of lease and release of the 20th and 21st of *April* 1762, between *T. Tonman*, *Mary Jones*, *Hannah Jones*, and *Thomas Jones* her husband, a partition of *John Hope's* estates was made; and thereby the whole of those estates in the county of *Monmouth* was allotted and conveyed in severalty to *Hannah Jones* and her heirs, for her third; certain parts of his *Radnorshire* estates were allotted and conveyed in severalty to *Mary Jones* and her heirs, for her third; and other parts of the *Radnorshire* estates were allotted and conveyed in severalty to *T. Tonman* and his heirs, for his third; of which latter *T. Tonman* thereby became seised in fee, subject however to the trusts of the said settlement. In the year 1763 *T. Tonman*, in consideration of 2300*l.*, purchased of *T. Jones* and *Hannah* his wife the *Monmouthshire* estates allotted to the latter for her third; and the same were by indentures of lease and release of the 14th and 15th of *January* 1763 conveyed to *T. Tonman* in fee. *T. Tonman* had issue by *Dorothy* his wife a son *John*, since deceased, and a daughter *Elizabeth*. *T. Tonman* made his will, dated the 30th of *January* 1787, duly executed, in the following words:

[151] “Whereas I am seised in fee of a messuage or dwelling-house, “and several lands and hereditaments in the parish of *Llanvihangel Nant Mellon*, in the county of *Radnor*, and of a moiety “of a messuage or dwelling-house, with several lands, hereditaments, and appurtenances thereunto belonging, in the parish “of *Old Radnor* in the said county of *Radnor*; and I am also “seised of the reversion in fee, expectant on the death of my wife “*Dorothy*, and on the death of my son *John* without issue, of divers messuages, lands, and hereditaments, with their appurtenances, in the several counties of *Monmouth* and *Northumberland*, which were part of the estate of my late uncle *John Hope* deceased: Now I do give and devise all my said estate in the said “county of *Radnor*, with their and every of their appurtenances, unto “my wife *Dorothy* for her natural life; remainder unto my son “*John* for his natural life, without impeachment of waste: “remainder

1806.

 MOSLEY
 against
 MASSEY.

[152]

“ remainder to trustees and their heirs during the natural life of
 “ my son *John*, upon trust to preserve contingent uses, &c.;
 “ and from and immediately after the decease of my said son
 “ *John*,” (then he limits the same to the use of the first and
 other sons of his son *John* to be begotten successively in tail;
 and in default of such issue to the use of the daughters of his
 son *John* share and share alike, as tenants in common in tail,
 with cross remainders.) “ And as for and concerning *the re-*
 “ *version, remainder, and inheritance as well of my said estates in*
 “ *the said county of Radnor*, with the appurtenances, from and
 “ immediately after the determination of the said several and
 “ respective uses and estates thereof herein-before limited, and
 “ as the same shall respectively end and determine, *as also of the*
 “ *said messuages, lands and hereditaments in the said several counties*
 “ *of Monmouth and Northumberland*, with their appurtenances,
 “ from and after the death of my said wife, and of *my said son*
 “ *John without issue*, I do give and devise the same unto and to
 “ the use of my daughter *Elizabeth* for her natural life, without
 “ impeachment of waste; remainder to the use of the said
 “ (trustees) and their heirs to preserve the contingent uses, &c.”
 (And then after her death he limits the same in strict settlement
 to the use of her first and other sons successively in tail; re-
 mainder to the use of her daughters as tenants in common in
 tail, with cross remainders between them;) with divers re-
 mainders over. The testator *T. Tonman* died without revoking
 or altering his will, leaving his wife *Dorothy* and his two
 children *John* and *Elizabeth* him surviving. The testator *T. Ton-*
man was in point of law *seised in fee* of the estates *in the county of*
Radnor, of which his will states him to be seised in fee: but
 those estates were bound in equity by his marriage settlement
 before mentioned, under which he was at the time of making
 his will and at the time of his death entitled to the equitable
 reversion in fee thereof, subject to the prior trusts of his mar-
 riage settlement of the 5th and 6th of *January 1762*: and the
 testator had not at the time of making his will and at his death
 any other estate in the county of *Radnor*. The testator in point
 of fact *was not seised of the reversion in fee* of the estates *in the*
county of Monmouth, of which his will states him to be so seised;
 but he was at the time of making his will and at his death
 seised *in fee in possession* of the estates in the county of *Mon-*
mouth;

1806.

—
MOSLEY
against
MASSEY.

mouth, which had been allotted to *Hannah Jones* for her third upon the abovementioned partition; and which estates were purchased by the testator and conveyed to him by the said deeds of the 14th and 15th of *January* 1763. And the testator had not at the time of making his will and at his death any other estate in the county of *Monmouth*. The questions for the opinion of the Court are,

First, Whether *John Tonman* the son, by virtue of the will of *Thomas Tonman*, took any and what interest in the real estate in the county of *Monmouth*, of which *T. Tonman* was so seised at the time of making his said will.

Second, Whether *Elizabeth Tonman* the daughter took any and what interest by virtue of the said will, in the *Monmouthshire* estate.

Third, Whether *John Tonman* took any and what interest in the *Radnorshire* estate.

Fourth, Whether *Elizabeth Tonman* took any and what interest in the *Radnorshire* estate.

Wetherell for the plaintiff. The devisor was seised in fee in possession of the *Monmouthshire* estate which he had purchased of *Jones*; and he had a disposing power over the reversion only of the *Radnorshire* estate; that estate being bound in equity by the uses of his marriage settlement. But in the recital of his will he has reversed the local description of the two estates; misdescribing the estate of which he was seised in fee in possession, as being in the county of *Radnor* instead of *Monmouth*; and vice versa misdescribing the reversionary estate which he had to dispose of, as lying in the county of *Monmouth* instead of *Radnor* (for in fact he had no estate in *Northumberland*). If this mistake can be corrected, all the devises severally made of each estate will take place of course; which otherwise are for the most part incongruous and inapplicable. First, the mistake is judicially apparent upon the face of the will; and by comparing the recital with the disposing clauses, and then with the several estates which he had to dispose of, it is plain that when the devisor recites that he was seised in fee (by which must be understood in possession) of one estate, he meant his estate in *Monmouthshire*, in which he was seised of the absolute fee; and not that in *Radnorshire*, in which he had only a reversion disposeable: and when he recites himself to be seised of the

1806.

 MOSLEY
against
 MASSEY.

the *reversion* in fee, expectant, &c. (which was the exact description of his settled estate) of another estate, he must have intended that in the county of *Radnor*, and not that of *Monmouth*, where he had no such reversion. Unless therefore this verbal mistake can be rectified by the apparent intent of the deviser, the will must fall to the ground; for being seised only of the reversion of the *Radnorshire* estate in equity, he could not devise it to present uses. Nor on the other hand is it reasonable to suppose that he should only dispose of the reversion of the *Monmouthshire* estate, (of which he was seised in fee in possession,) after the deaths of his wife and son without issue, to whom he had not before given any interest in that estate. The mistake is further shewn by the description which he adds to the reversionary interest in the lands which he meant to devise, namely, "*which were part of the estate of my late uncle John Hope, deceased;*" which description immediately applied to the estate in *Radnorshire*, which he had by descent from his uncle; the other estate, though once part of his uncle's property, coming immediately to him by purchase; though he has reversed the local description of the two estates. Secondly, assuming that it appears judicially to the Court, that the local description of the two estates is a mere mistake, the Court may correct it by construing the will according to the real intention apparent of the deviser. As where one having only a reversionary estate in the city of *Worcester* devised all his estate in possession in that city; yet the reversion was holden to pass. *Heuster v. Corbett*, 34 H. 6. p. 16. recognized in *Howe v. Connye* (a). So a devise of a manor has passed a *fee-farm-rent* (b); because the deviser, having nothing else in the manor, could mean nothing else, and the will would otherwise be void. So *Plowd.* 524. and *Bro. Devise*, pl. 48. where one, after the stat. 27 H. 8., devised that his executors should be seised to the use of A. and his assigns in fee, whereas there were then no feoffees to uses; yet the estate passed *ratione intentionis*. And in *Plowd.* 522. it is said, that where the intent of the testator is evident by the

[155]

(a) 1 Leon. 180.

(b) *Inchly v. Robinson*, 3 Leon. 165. refers to *Fitz. tit. Feoffments and Fairs*, pl. 12.

1806.

MOSLEY
against
MASSEY.

[156]

words, it is the office of the Court so to marshal and construe the words that the intent may take place, and the thing be effected and not destroyed, if any sense at all can be made of them by law. Again, a devise of all the devisor's *free land* in *H.* was adjudged (a) to pass *tithes*; he having nothing else there. *Rolle* said, that the intent should prevail if it could be found out; though it could not be collected *ex vi termini*; for that otherwise the will would be void. And for the same reason a devise (b) of *freehold* passed *leasehold* lands, where there were none other. In *Mirrill v. Nichols* (c) one having a moiety in *Essex*, and the other moiety in *Kent*, by several purchases from the same person, devised "as to my moieties, I devise *all my moieties in Kent to A. B.*;" saying nothing of his moiety in *Essex*: yet this was holden to pass both. And in *Owens v. Bean* (d) a devise of a charity to the poor of the parish of *Langenew* in the county of *Montgomery* was sustained; though the parish of that name (in which the testator and his parents had lived and died) was in the county of *Denbigh*. There is another class of cases (e) where devises have been holden good, though the christian names of the devisees were mistaken, if the persons were ascertainable by other circumstances. And he also referred to *Vinnius' Commentary on Justinian*, 459 (f). Now here the correction to be made is merely by transposing the words of local description, *Monmouth* and *Radnor*, or by rejecting them altogether, and not by substituting new words of description; the estates intended to be passed being sufficiently identified by the mention of them as formerly part of his uncle *Hope's* estate.

[157]

Nolan contra. The devisor was tenant in fee of the *Radnorshire* estate, which he had by descent from his uncle *Hope*; though bound in equity by the uses of his marriage settlement; and he was also seised in fee of his estate in *Monmouthshire* unfettered, which he had obtained by purchase from another co-heir of his uncle: and as both the estates had belonged to his uncle, there is nothing in this description to distinguish them. How-

(a) *Saunders v. Rich. Sty.* 261, 279. 1 *Rol. Abr.* 614. pl. 4.

(b) *Day v. Trig.* by *Tracy J.* 1 *Pr. Wms.* 287.

(c) 2 *Bulstr.* 176.

(d) *Finch's R.* 395.

(e) *Pitcairn v. Brace*, *Finch's Rep.* 403. 2 *Eq. Cas. Abr.* 416. pl. 6. and *River's case*, 1 *Atk.* 410.

(f) *Vi. Just. Inst.* lib. 2. tit. 20. s. 29, 30, 31.

ever probable therefore it may be that a mistake has happened in describing the different estates, the Court can have no legal certainty of it, and therefore cannot correct it, either by transposing or rejecting words which have a sensible meaning on the face of the will in the place where they are used. First, then, supposing no transposition of the words of description can be made, *John Tonman* the son would take an estate tail by *implication* in the *Monmouthshire* estate; the same being limited to the deviser's daughter *Elizabeth*, after the death of his son *John without issue*; and he being the heir at law of the testator, and his common law estate abridged by the will. On this point he referred to *Walter v. Drew* (a), *Moore v. Parker* (b), *Lady Lanesborough v. Fox* (c), and *Jones v. Morgan* (d). In that view the devise to *Elizabeth*, and all the other devises of that estate, will follow. But though the son *John* took no estate in the *Monmouthshire* property by the will: yet this cannot be considered as an executory devise to *Elizabeth after an indefinite failure of issue of John*, and therefore too remote; because *Elizabeth* herself having only a life estate, the devise to her on failure of *John's* issue must necessarily be confined to such failure in her life-time: according to *Oakes v. Chalfont* (e); and *Doe v. Lyde* (f). Then, with respect to the *Radnorshire* property, *John Tonman* took an estate tail under the settlement; but, under the will, only an estate for life, with remainder to his sons in tail, &c. remainder to *Elizabeth* for life, &c.; and all the intermediate estates having failed, *Elizabeth's* estate would now vest in possession. In point of law the testator was seised in fee of the *Radnorshire* estate, though bound in equity by the uses of his marriage-settlement: and the legal estate will therefore pass. And whether he were mistaken, in fact, in substituting *Monmouth* for *Radnor*, and vice versâ; or whether he were mistaken in law in supposing he could deal with that estate, as if not fettered by the settlement in equity; the

1806.

—
MOSLEY
against
MASSEY.

[158]

(a) *Com. Rep.* 372.(b) 1 *Lord Raym.* 37. 4 *Mod.* 316. and *Skin.* 558.(c) *Cas. Temp. Talb.* 262.(d) 1 *Bro. Ch. Cas.* 206. and *Fearne's Ex. Dev.* 4th edit. 126 and all the other cases are collected in the latter book, 116 to 126, and 197, and vide *Roed. Conolly v. Vernon*, 5 *East*, 51.(e) *Pollex.* 38.(f) 1 *Term. Rep.* 593.

1806.

MOSLEY
against
MASSEY.

[159]

Court have no means of discovering. But though the will should be wholly void in consequence of the mistake, they cannot amend it by substituting the one word for the other throughout the will. As it stands, one part of the description, the county, applies properly to neither of the estates; the other, that of having belonged to his uncle *Hope*, applies equally to both; and therefore affords no criterion for distinguishing between them. The whole argument turns on two of Lord *Bacon's* maxims (*a*), *Ambiguitas verborum latens verificatione facti suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur*. And *Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis*; the doctrine of which is illustrated by Lord *Kenyon*, in *Thomas v. Thomas* (*b*). All the older cases cited for the plaintiff go on this, that inapt words of description may be rejected, if the remaining words be sufficient to describe the estate meant to be devised. But the words now desired to be expunged are sensible and material as they stand on the face of the will, and there is property on which they can attach: the only doubt is raised by evidence dehors the will: but the rule now established is that *ambiguitas latens* may be explained by extrinsic evidence; but not *ambiguitas patens*. As where there are two persons of the same name as that mentioned in the will, evidence may be given to shew which the testator meant: or where the devise is to one by a wrong name, it may be shewn that the testator was in the habit of calling the devisee by such wrong name (*c*). So a false description may be rejected, where there is a further true description by which the identity of the person (*d*) or property (*e*) meant is proved. But here if the county be rejected, there is no other description left than what is common to both estates. In other cases, such as that cited from the year book, the question was, whether the description used, though not strictly proper, were not large enough to carry the thing devised. And though it may be doubted whether some of these decisions would have been made in later times; yet they professed at least

[160]

(a) P. 99. & 102.

(b) 2 Term Rep. 676.

(c) *Beaumont v. Fell*, 5. Pr. Wms. 140.

(d) *Pitcairn v. Brase, Finch, Rep.* 403. and *Dowset v. Sweet. Amb.* 175.

(e) *Owens v. Bean, Finch, Rep.* 395.

to be a construction of the words used; and not to proceed upon an undefined power of transposing and rejecting sensible words. Distinct sentences indeed have sometimes been transposed, in order to shew the testator's meaning more clearly; but there is no instance of words being taken from one sentence and put in another.

Wetherell in reply. As to the *Radnorshire* estate, it is not a sufficient answer to say that the will, as it now stands, will be effectual to pass the *legal* estate, it being apparent that the deviser meant to pass the *beneficial* interest: and devises for life to the wife and son could not operate; because they would take under the settlement, and not under the will; the one a life estate, the other in tail. Neither could the devises to trustees and the sons of *John* take effect. And as there would be no such precedent estates as those devised by the will, there would be nothing to support the devise of the reversion to *Elizabeth*. As to the *Monmouthshire* property, he contended that the son could not take an estate tail by implication, under the words giving over the estate on failure of his issue: and that the cases cited did not support that position. *Oakes v. Chalfont*, and *Doe v. Lyde*, turned upon immediate gifts for life of chattels, upon failure of issue of others, and not upon the implication of estates tail in those persons. *Moore v. Parker* makes rather against the defendant's argument. And in *Jones v. Morgan*, Lord Chancellor thought that an estate tail could not be raised by such an implication. And though such an estate was raised in *Walter v. Drew* to support the remainder; yet that was on the ground of the apparent intention of the testator to give such an estate, but here no such intent appears; for *John* the son had a preceding estate tail under the settlement, which accounts for the omission of him altogether; and it would be absurd to presume an intent in the deviser to give him an estate tail in the *Monmouthshire* estate, in which nothing is directly given to him, when by the devise of the *Radnorshire* estate as it stands, he would only take for life.

The Court said they would certify their opinion; which was afterwards done as follows.

This case has been argued before us by counsel: We have considered it; and it appears to us to have been the plain intent of the testator to limit the estate, formerly of his uncle *Hope*, of which he was seised *in fee in possession*, to his wife for life;

1806.

—
MOSLEY
against
MASSEY.

[161]

1806.

MOSLEY
against
MASSEY.

life; remainder to his son *John Tonman* for life, remainder to his first and other sons in tail general; with remainder to the daughters of his said son in tail general, as tenants in common, with cross remainders; remainder to the testator's daughter *Elizabeth* for life; with the like limitations to her children: and to limit the estate, formerly of his uncle *Hope*, of which he was seised *in fee, subject to the uses of his marriage settlement*, (the reversion only of which he considered himself seised of after the deaths of his wife and his son *John Tonman*, without issue) to his, the testator's, daughter *Elizabeth* for life; with remainder to her first and other sons in tail general; remainder to her daughters: But, that in describing the two several estates, the testator, or the person transcribing the will, has made a mistake in the description of them, with respect to the counties in which they are respectively situated. Comparing, however, the devising clause with the recital and the facts stated in the case, we think that sufficient appears to ascertain beyond a possibility of doubt what estates the testator intended to limit as above, independent of their local description. We are therefore of opinion, in order to effectuate the plain intent of the testator, First, that *John Tonman* the son, by virtue of the will of his said father *Thomas Tonman*, took an estate for life, in remainder after the death of the testator's wife, in the real estate situate in the county of *Monmouth*, of and in which the said *Thomas Tonman* was so seised, as stated in the case, at the time of making his said will. Secondly, that the said *Elizabeth Tonman* took an estate for life, in remainder, in the said real estate situate in the said county of *Monmouth*, from and after the determination of estates for life in the testator's wife and his said son *John Tonman*, and of estates tail in his first and other sons, and in his daughters as tenants in common respectively. Thirdly, that the said *John Tonman*, the son, by virtue of the will of his said father, did not take any interest in the said real estate situate in the county of *Radnor*. And fourthly, that the said *Elizabeth Tonman*, under and by virtue of the will of her said father, took an estate for life, with remainder to her first and other sons in tail, with remainder to her daughters in tail, as tenants in common, in the premises situate in the county of *Radnor*, subject to and after the determination of the estates and interest to which the testator's wife and son *John Tonman*

[162]

[163]

Tonman

Tonman were entitled under the settlement made on the marriage of the testator, *Thomas Tonman*.

28th November 1806.

1806.

—
MOSLEY
against
MASSEY.

ELLENBOROUGH,
N. GROSE.
S. LAWRENCE.
S. LE BLANC.

END OF MICHAELMAS TERM.

C A S E S

1807.

ARGUED AND DETERMINED

IN THE

Court of KING'S BENCH,

IN

Hilary Term,

In the Forty-seventh Year of the Reign of GEORGE III.

DOE, on the Demise of WARNER *against* BROWNE. *Saturday, Jan. 24th.*

IN ejectment for a certain messuage in the parish of *St. Sepulchre*, in the city of *London*, it appeared that the defendant held under the following agreement, “ Memorandum of an agreement made the 6th of *March* 1801, between *W. Warner* and *J. Browne*. *W. Warner*, in consideration of 40*l.* doth agree to let, and *J. Browne* doth agree to take, a messuage, &c. at 40*l.* per annum, clear rent, to be paid quarterly, &c. And it is further agreed, that *W. Warner* shall not raise the rent, nor turn out *J. Browne* so long as the rent is duly paid quarterly, and he does not expose to sale or sell any article that may be injurious to *W. Warner* in his business. And it is further agreed, that in case of removal, *J. Browne* shall be at liberty to receive the aforesaid sum of 40*l.* of the next tenant *W. Warner* shall accept.” Signed by both parties. *It did not appear that the

An agreement to lease at a certain rent, and that the lessor should not turn out the tenant so long as he paid the rent, and did not sell, &c. any article injurious to the lessor's business, either purports to be a lease for life, and would then be void, as not being

creatable by parol; or if it operate as a tenancy from year to year, it must necessarily be determinable by either party giving the regular notice to quit.

*[167]

1807.

—
DOE
against
BROWNE.

defendant had broken either of the stipulated conditions ; but the lessor of the plaintiff rested his case on proving half a year's previous notice to the defendant to quit on the 25th of *March* 1806, after which the demise was laid. And the question was, whether the lessor had a right to determine the tenancy on such notice, considering the defendant as tenant only from year to year. Lord *Ellenborough* C. J., at the trial, held the notice to be good ; and a verdict was accordingly taken for the plaintiff, with leave to the defendant to move to enter a nonsuit. And a rule nisi having been obtained for that purpose in the last term, upon the ground that the agreement operated as a lease for so long time as the tenant pleased, and he complied with the conditions ;

Lord ELLENBOROUGH C. J., after reading his report of the evidence, asked what estate the defendant was contended to have ; and whether he were not in this dilemma ; that either his estate might enure for life, at his option ; and then, according to Lord *Coke* (a), such an estate would, in legal contemplation, be an estate for life ; which could not be created by parol : or if not for life, being for no assignable period, it must operate as a tenancy from year to year ; in which case it would be inconsistent with, and repugnant to the nature of such an estate, that it should not be determinable at the pleasure of either party giving the regular notice.

[167]

Lawes, in support of the rule, contended that the agreement might operate as a lease from year to year determinable only at the will of the tenant, so long as he complied with the terms of it ; the lessor binding himself while the conditions were observed not to give notice to quit. And he cited *Right v. Proctor* (b), that a lessor shall not recover in ejectment against his covenant ; and *Doe d. Rigge v. Bell* (c) ; where though the lease by parol for 7 years was avoided by the statute of frauds, yet the lessor was holden to be bound by his agreement, as to the time of giving notice to quit.

Lord ELLENBOROUGH C. J. It was not repugnant to the nature of the estate there, that the agreement, though void as to the duration of the lease, should regulate the time of giving notice to quit : but here it is entirely repugnant to the nature

(a) *Co. Lit.* 42. (b) 4 *Burr.* 2208. (c) 5 *Term Rep.* 471.

of a tenancy from year to year, such as this is contended to be, that the option of determining it should rest solely with the tenant.

GROSE J. concurred.

LAWRENCE J. If this interest be not determinable so long as the tenant complies with the terms of the agreement, it would operate as an estate for life; which can only be created by deed, as a feoffment, or a conveyance to uses. The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, which was once thrown out by Lord Mansfield, has been long exploded.

LE BLANC J. The case of *Doe v. Bell* was considered as a tenancy from year to year, with all its consequences; though it was open to the same objection, that the lessor had in effect agreed not to give notice to quit during the seven years for which the agreement purported to have been made.

Rule discharged.

Garrow and *Comyn* were to have opposed the rule.

1807.

—
DOE
against
BROWNE.

[168]

HUME *against* PEPLOE.

Tuesday,
Jan. 27th.

THIS was an action by the indorsee against the acceptor of a bill of exchange for 57*l.* 15*s.* drawn the 21st of *January* 1805, payable at six months after date. Plea—that the plaintiff ought not to maintain his action thereof against the defendant to recover any *more or greater damages than* 59*l.* 12*s.* 6*d.* in this behalf; because that *after making the promise, &c. and after the expiration of the time* appointed for the payment of the said bill of exchange, *and before* this action commenced, viz. on the 19th of *November* 1805, he was ready and willing, and then tendered to pay to the plaintiff the said 59*l.* 12*s.* 6*d.* then being the *whole* money which had become due, or was then owing or payable by the defendant to the plaintiff, upon and in respect of the said bill of exchange, with lawful interest thereon, for

A plea of tender *after the day of payment* of a bill of exchange, and *before action brought*, is not good; though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the *whole money then*

due, owing, or payable to the plaintiff in respect of the bill, with interest, from the time of the default, *for the damages* sustained by the plaintiff by reason of the non-performance of the promise.

1807.

—
HUME
against
PEPLOE.

[169]

or in respect of the damages sustained by the plaintiff by reason of the non-performance of the said promise. The defendant then averred that he *always from the time of the making of the said tender* to the plaintiff of the 59*l.* 12*s.* 6*d.* hitherto hath been, and still is ready to pay to the plaintiff the said 59*l.* 12*s.* 6*d.*; and now brings the same into court, &c. Replication—that after making the said promise, and when the bill became due and payable, it was presented for payment to the defendant, who was required to pay it; but that the defendant did not pay it, but wholly made default, &c. The rejoinder admitting such default, stated that *after* the bill had been so presented for payment, and *after such default*, and *before* this action commenced, the defendant *tendered* to the plaintiff the said 59*l.* 12*s.* 6*d.* now brought into court, in manner and form as in the plea alleged; the said 59*l.* 12*s.* 6*d.* then being the *whole* money which had become or was then due, owing, or payable by the defendant to the plaintiff upon or in respect of the said bill, with lawful interest thereon from the time of the aforesaid default in payment thereof, for or in respect of the *damages* sustained by the plaintiff by reason of the non-performance of the said promise: and that the plaintiff did not, at any time after the making of the said tender of the 59*l.* 12*s.* 6*d.* and before this action commenced, demand payment of the same or any part thereof. To this there was a general demurrer, and joinder.

[170]

Lord ELLENBOROUGH C. J. stopped *Holroyd*, who was to have argued in support of the demurrer, and asked the defendant's counsel if he could shew any case where an averment of *touts temps prist* was holden not to be necessary in a plea of tender: it was expressly decided to be necessary in *Giles v. Hartis* (a), and was one of those land-marks in pleading that ought not to be departed from. The defendant has been guilty of a neglect, in non-payment of money at a certain day, upon which a cause of action arises to the plaintiff. It is no answer to shew that at a day subsequent he was ready to have paid it, unless he were always ready to have paid it from the time when it first became due. And no injustice is done; because the defendant may get relief by application to the Court for leave to pay the

(a) 1 *Lord Raym.* 254. and vide *Wood v. Ridge, Fort.* 376.

principal and interest into court ; after which the plaintiff proceeds at his peril.

1807.

HUME
against
PEPLOE.

Lawes, for the defendant, admitted the inefficiency of such a plea in any case where the damages were arbitrary, and could only be ascertained by the intervention of a jury: but urged, that where the damages were the subject of mere computation, as in this case, the interest which had accrued from the dishonour of the bill, there was no reason why they should not be the subject of a tender; and if the plaintiff had sustained greater damages than the loss of interest by reason of the defendant's default, he should have replied that: instead of which he admits by his demurrer that the sum tendered was the whole money which had become due in respect of the bill, with lawful interest from the time of the default, *in respect of the damages* sustained by him by reason of the non-performance of the defendant's promise. And the tender is pleaded not in bar of the action, but only in bar of ulterior damages.

LORD ELLENBOROUGH C. J. The same argument would serve in support of every case of a tender after the cause of action arose, and before the action commenced: but in strictness a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract; and we cannot now suffer a new form of pleading to be introduced different from that which has always prevailed in this case. The damages indeed have sometimes varied as the rate of interest has been changed. And though the Court have adopted the practice of referring it to their officer to compute principal and interest on bills of exchange, instead of sending it to a jury to make the same computation; yet that is always a matter in the discretion of the Court, and not to be obtained without motion.

[171]

LAWRENCE J. This is a plea in bar of the plaintiff's demand, which is for damages; and therefore it ought to shew upon the record that he never had any such cause of action: but here the plea admits it.

Per Curiam,

Judgment for the Plaintiff.

1807.

Tuesday,
Jan. 27th.

PITCHER against BAILEY.

If an officer permit a prisoner to go at large on his promise to pay the debt to the creditor; in consequence of which he is obliged to pay the creditor himself; he cannot recover back the money from the debtor; being guilty of a breach of duty, out of which he cannot derive a cause of action.

*[172]

CLOSE, an officer of the Marshalsea Court, having arrested the defendant upon a writ at the suit of one *Pidgeon*, afterwards set him at large upon his promising to pay *Pidgeon* immediately; instead of which he absconded, and *Close* was obliged to satisfy *Pidgeon's* demand. *Close* afterwards became insolvent; and the plaintiff; as his assignee under the insolvent debtors' act, brought this action against the defendant for money paid by *Close* to his use. But Lord *Ellenborough* C. J. upon the authority of *Eyles v. Faikney* (a), nonsuited the plaintiff at the last sittings for *Middlesex*, upon the ground that the officer could not raise any cause of action by the payment * of money for another, on account of his own breach of duty.

Park now moved to set aside the nonsuit; stating that there were conflicting authorities upon the subject: the opinions of *Yates* J. and *Gould* J., in a case (b) before that of *Eyles v. Faik-*

(a) *E. 32 G. 3. B. R.* referred to in a note to *Cordron v. Lord Masarene*, *Peake's Ni. Pri. Cas.* 144.

(b) Cited in *Peake's Ni. Pri. Cas.* 144. According to my note of the case of *Eyles v. Faikney*, the case there referred to of *Morris v. Berkeley*, *Worcester Spring Assizes 1765*, before *Yates* J. was an action against a sheriff for an escape; wherein the learned judge said, that if a sheriff voluntarily permit an escape, and be afterwards obliged to pay the debt, he may maintain an action for money paid against the debtor. And so, he said, it had been determined in another case before him, where he had called in the assistance of Mr. Justice *Gould*, and they had both sat to try the cause. As the Court, however, in *Eyles v. Faikney*, seemed to be clear that that opinion in the extent of it could not be law; it was contended by the counsel, in support of the rule for a new trial, that the circumstances of the case shewed that the escape in question was a *negligent* and not a *voluntary* escape. After which, Lord *Kenyon* asked the defendant's counsel who was to oppose the rule, whether he had any objection to put the case in the shape of a special verdict. But the counsel contended that he was at all events entitled to discharge the rule; for whatever the doubt might be as to a *negligent* escape, this was a *voluntary* one; being the voluntary act of the gaoler, whatever his motive might be. And on this ground the Court said, that at any rate the rule must be discharged.

ney,

ney, being in direct variance to the latter; and that of *Buller J.* in *Cordron v. Lord Masserene*, immediately afterwards, also trenching upon it: and no reasons being assigned in the report for the determination of the Court in that case. And supposing the question to be still open, he urged that there was no corrupt motive in the officer in permitting the defendant to go at large: and though it were an escape in law, so as to make him liable to the plaintiff in the original suit; yet it did not lie in this defendant's mouth to make the objection, on whose promise to pay the debt he had been liberated by the officer.

But all *The Court* agreed that the case of *Eyles v. Faikney* was well decided, and governed the present: and that an officer guilty of a breach of duty could not recover money which he had paid in consequence of it, though for the benefit of the defendant.

Rule refused.

1807.

PITCHER
against
BAILEY.

[173]

COOKE *against* The Hundredors of PIMHILL, in the
County of SALOP.

Tuesday,
Jan. 27th.

THIS was an action upon the stat. 9 *Geo.* 1. c. 22. s. 8. to recover the value of a stack of corn the property of the plaintiff, alleged to have been wilfully, maliciously, and feloniously set on fire, and consumed, *in the parish of Baschurch*, within the hundred of *Pimhill*, in the county of *Salop*, by some person or persons unknown to the plaintiff, in the night of *Thursday* 21st of *November* 1805: and the declaration averred, "that the plaintiff did within two days next after the committing of the said offence, and of the damage done as aforesaid, viz. on &c. *at the parish* aforesaid, in the hundred and county aforesaid, give notice of the said offence and damage to divers of the inhabitants of the said *parish* within the hundred and county afore-

The declaration in an action on the stat. 9 *G.* 1. c. 22. s. 8., to recover damages against the hundred for the value of a stack of corn maliciously burnt, alleged that notice of the fact was given within two days to the inhabitants

of the *parish* (instead of the "*town, village, or hamlet*," which are the words of the act,) *near* the place, &c.: yet as the law *prima facie* intends every parish to be a *vill* unless the contrary be shewn, this allegation is sufficient after verdict to sustain judgment for the plaintiff. But if it had been shewn at the trial that the parish consisted of several vills, and that the notice had been given to one more distant than another, the defendants would have been entitled to a verdict.

1807.

COOKE
against
The Hun-
dreds of
PIMHILL.
*[174]

said, being near unto the said place where the said offence and damage were so committed * and done as aforesaid, *according to the form of the statute,*" &c. and so it proceeded to aver that the plaintiff, within four days after the said notice, gave in his examination on oath before a justice of peace, and complied with the other requisitions of the act. After verdict for the plaintiff, a rule nisi was obtained in the last term for arresting the judgment, on the ground that the declaration had not pursued the words of the statute, in averring that the plaintiff, within two days next after the offence committed, gave notice of it to the inhabitants of some *town, village, or hamlet* near the place, &c.; but only averred such notice to have been given to the inhabitants of the *parish* near to the place; which might be in a distant part of the *parish*, and to inhabitants living dispersed in retired situations, who might have no means of ascertaining the truth of the fact.

Dauncey and *Wigley* now shewed for cause, that every *parish* is in law intended to be a *vill*, unless the contrary appear; and cited 4 *Com. Dig.* tit. *Parish*, (C. 1.) referring to *Co. Lit.* 125 (b); *Wilson v. Laws*, M. 6. W. 3. referred to in *Rudd v. Morton* (a), *Wray v. Vesper* (b), *Lawrence v. Johns* (c), and *Vale v. Field* (d); and this being after verdict the Court will presume that every thing was proved necessary to sustain the declaration (e), and consequently that *Baschurch* was proved to be one entire vill; especially as the notice is alleged to have been given "according to the form of the statute."

[175]

Williams Serjt. and *Abbott*, in support of the rule, said that the statute in question, though remedial as to the plaintiff, was strictly a penal law as to the defendants, and to be construed accordingly (f). The object of requiring the notice to be given was to make the transaction immediately notorious, as well for the prevention of fraudulent charges as to raise the country by hue and cry upon the felons, where a felony was actually committed. This could not so well be answered by requiring notice to be given to the inhabitants of the *parish* near to the

(a) *Salk.* 501. (b) *Cro. Jac.* 263. (c) *Ib.* 274. (d) *Ib.* 340.
(e) *Hitchen v. Stevens*, 2 *Show.* 233. and vide *Rushton v. Aspinall*,
Dougl. 681, 3.

(f) *Norris v. The Hundred of Gawtry*, *Hob.* 139.

place, as to the inhabitants of some near *town, village* or *hamlet*; which are the words of the act, all of them properly descriptive of a collection of houses and inhabitants, and not of a mere ecclesiastical division, like a *parish*: the act itself, therefore, by using those words, and omitting the word *parish*, has in terms as well as in reason distinguished between them; which rebuts the common presumption of law prevailing in the cases of venue, which have been cited, where it was unnecessary to distinguish between a vill and a parish. And if this be the true construction of the statute in question, the verdict will not help, nor the general allegation that notice was given “according to the form of the statute.”

LORD ELLENBOROUGH C. J. After verdict every thing shall be intended to have been proved which is alleged in the declaration: and here the question is whether there be not a sufficient allegation of notice to satisfy the requisition of the act? It is stated that the notice was given to divers inhabitants of the *parish* near the place; and which it is objected ought to have been averred to be given to the inhabitants of the *vill*. But it has been decided by a variety of cases that every *parish* shall *primâ facie* be intended to be a *vill* unless the contrary be shewn. We must then presume that the judge who tried the cause, in receiving proof of the allegation that notice was given to the inhabitants of the *parish*, received evidence of notice having been given to the inhabitants of the *vill* of *Baschurch*. That might have been rebutted at the trial by shewing that the parish contained several vills, and that the notice was not given to a near vill, but to one at a distance from the place where the fact was committed; which would be a bad notice. But that must be shewn; we cannot intend that such evidence was given. If, however, it were necessary to go further into that subject, there are allegations on the record (not the mere allegation that the notice was given “according to the form of the statute”), that after verdict would lead to the presumption that such notice as the statute requires had been given in this case: for it is averred that notice was given to the inhabitants of the parish “near to the place, &c. according to the form of the statute.” But without resorting to that, there is a competent allegation on the record of notice given to that place, which
the

1807.

COOKE
against
The Hun-
dreds of
PIMHILL.

[176]

1807.

COOKE
against
The Hun-
dreds of
PIMHILL.

[177]

the Court and jury are *primâ facie* to presume to be a *vill*, unless the contrary be shewn to them.

GROSE J. The question is, whether that which is averred be not tantamount to an averment that notice was given to the *vill* near the place, &c.? It is admitted that a *parish* may be a *vill*; and if so, and the statute requires notice to the vill, it was a question to be considered at the trial, whether the notice proved were notice to a vill; and if it were not, there would have been a verdict for the defendants. After verdict, therefore, for the plaintiff, we must presume that *Baschurch* was proved to be a vill.

LAWRENCE J. After verdict, that which is alleged must be taken to have been proved; which is that notice was given to the inhabitants of the parish of *Baschurch*, which the law *primâ facie* presumes to be a vill, unless the contrary be shewn.

LE BLANC J. If proof had been offered at the trial, that the parish of *Baschurch* consisted of several vills, and that the notice had been given to a distant vill, it would not have been proof of such a notice as the statute requires, and there would have been a verdict for the defendants.

Rule discharged.

[178]

Tuesday,
Jan. 27th.

PHILLIPS *against* DAVIES.

In an action on the stat. 2 & 3 Ed. 6. c. 13. for the treble value of tithe corn, omitted to be set out, it is not enough for the defendant to shew the existence, *in fact* of a custom, in the parish to set out the 11th instead of the 10th mow, for the validity, as well as existence of such a custom, is properly triable in this form of action, though penal in its nature: being given to the party grieved, and his only remedy at common law for subtraction of the tithe due to him.

THIS was an action on the stat. 2 & 3 Ed. 6. c. 13. by the impropiator, to recover the treble value of the tithe of corn omitted to be set out by the defendant. At the trial before *Le Blanc* J. at *Shrewsbury*, the defence set up was a custom to set out the eleventh mow of corn instead of the tenth: and after this had been established by many witnesses as the custom which had in fact always prevailed in the parish (according to which custom the tithe had in this instance been set out), and it appeared to the learned judge that there was a real question

of

of right to be tried between the parties, he nonsuited the plaintiff, on the ground, that an action to recover a penalty was not a proper form of action to try a substantial question of right, but that this fell within the principle of those cases (a) on the game laws, where it had been determined that a question of boundary between two manors should not be permitted to be tried in an action for a penalty.

Williams Serjt. moved in the last term to set aside the nonsuit; and argued that, whether or not the rule had been properly laid down in those cases on the game laws, at any rate it did not apply to the present case: for the 4th section of the act looks to the trial of questions of right, and provides that no person shall be compelled to pay tithes for any lands, which by the statute, or by any privilege or prescription, are not chargeable with such tithes, or that shall be discharged by any composition real. To ascertain such privileges, therefore, it is necessary to enter into evidence of them upon the trial: so it is considered by Lord *Coke* (b). And if one sort of exemption may be given in evidence, there is no reason for excluding evidence of any other. In *Buller's Nisi Prius* (c), the different kinds of defence are enumerated.

When the report was made, and cause was to have been shewn in this term by *Dauncey* and *Abbott*,

LE BLANC J. having consulted with the rest of the Court, said that he had been misled at the trial by the supposed analogy between this case and those upon the game laws; but upon consideration there appeared to be these material distinctions between them. This is an action by the party grieved who is the owner of the tithes; whereas actions for penalties on the game laws are brought by common informers. Also questions of boundary and of manors are triable in other actions, more appropriate to the trial of such questions than an action for a penalty; but this action for the treble value on the statute of *Ed. 6.* is the only common law remedy for asserting the party's right to take the tithes.

1807.

PHILLIPS
against
DAVIES.

[179]

(a) Vide *Calcraft v. Gibbs*, 4 Term Rep. 681. and the cases there cited; but in the principal case the nonsuit was set aside, because the defendant had no pretence of claim to the manor.

(b) 2 Inst. 651. &c.

(c) 188. &c.

1807.

PHILLIPS
against
DAVIES.

The other Judges concurred in opinion that the validity of the custom was fit to be tried in this action; which it was observed had not been determined; the trial having been stopped before it had gone to that extent.

Rule absolute.

[180]
Wednesday,
Jan. 28th.

The KING against TOMKINS.

It is not enough, in an order for remanding an insolvent debtor by the Sessions, to state that it appeared that he had obtained goods of A. B. (at whose suit he was detained) by false pretences; for either it should be stated in the words of the stat. 41 G. 3. c. 70. s. 40. (by virtue of which the order was made) that the party knowingly and designedly by false pretences obtained the goods; or

at least, that he *fraudulently*, by false pretences, obtained them; the description of the offence adopted by the stat. 46 Geo. 3. c. 108. s. 39. with reference to the former statute; (which word *fraudulently* is also used in the recital of the section in the former act.) And a second order of remand, however regular under the last statute, professing to be made upon view of the former defective order, was therefore quashed. But it is competent to any existing creditor to object to the discharge of an insolvent debtor, on due proof of such former offence described in the statute, though he were not a creditor at the time of such former order of remand made.

*[181]

said

said *R. Tomkins*, in order to take the benefit of the act, &c. for the relief of certain insolvent debtors: but it appearing to this Court that he obtained goods, value 113*l.* of J. K. and E. P. (at whose suit, amongst others, he is detained,) by false pretences; he is therefore for and on account thereof remanded back to the said prison of the *Fleet*, &c. to be detained until he shall be discharged by due course of law," &c.—It is ordered by this Court, that the said *R. Tomkins* be, and he is hereby remanded into the custody of the marshal of the said prison of the K. B."

1807.

—
The KING
against
TOMKINS.

The recited order of sessions of the 10th of *August* 1801, remanding the defendant into custody, (on which the last order was founded) was made upon the 40th section of the prior insolvent debtor's act of the 41 *G. 3. c. 70.*; which, reciting, that "evil disposed persons, to support their profligate way of life, have, by various subtle stratagems, threats, and devices, fraudulently obtained money, goods, &c. to the great injury of industrious families, and to the manifest prejudice of trade and credit, enacts that no prisoner, who knowingly and designedly, by false pretence or pretences, shall have obtained from any person money, goods, &c. shall have any benefit or discharge under this act." And by s. 52. in order that the objection for which the discharge was refused may be clear and certain, the justices are required to state it. The last order of remand in question was made upon the last insolvent debtors act of the 46 *G. 3. c. 108.* the 39th section of which provides "that no prisoner who shall have been remanded to prison, under any act heretofore passed for the relief of insolvent debtors, for having fraudulently obtained money, goods, &c. on false pretences, shall have any benefit or discharge under this act." And this is followed by a similar direction (s. 51.) as in the former statute.

[182]

Marryat, in moving for the rule in the last term, objected to the last order, as founded altogether upon the prior order of remand, which did not state a sufficient case within the stat. 41 *G. 3. c. 70.* to warrant it. 1st, In not stating that the defendant had knowingly and designedly, or fraudulently, by false pretences obtained the goods; which is the description of the offence mentioned in the 40th section. 2dly, In not stating what

1807.

—
The KING
against
TOMKINS.

what the false pretences were, which is required (a) in an indictment on the stat. 30 G. 2. c. 24. containing the same description of offence.

Lawes now shewed cause, and said, that every intendment should be made in support of an order of justices (b), though not of a conviction; and this is of the former description. Therefore the Court will intend that the justices making the former order of demand had satisfactory proof that the defendant had *knowingly and designedly* obtained the goods by false pretences; for the stat 41 G. 3. c. 70. s. 40. does not use the word *fraudulently* in the enacting part. But the order in question, now sought to be set aside, has the word *fraudulently*; which the last insolvent debtor's act, on which that order was founded, uses as descriptive of the offence in the prior statute.

[183]

The Court, however observed, that the last order professed to have been made merely upon the foundation of the former order of remand; and if that were bad upon the face of it, the order in question must also fall to the ground. But the effect of this, they said, would not be to direct the discharge of the prisoner; for if this order were quashed, it would still be open to the prosecutors, when he was brought up again to the sessions to be discharged, to shew that he had been guilty of any practices which would warrant their remanding him under the provisions of the act.

Lawes thereupon intimated that an objection had been taken and much pressed at the sessions, that it was not competent to any person to oppose the prisoner's discharge on account of such former mal-practices, unless they were creditors at the time; which might apply to those who would oppose his discharge on a future occasion.

Lord ELLENBOROUGH C.J. There is no foundation for the objection taken at the sessions, that the party objecting to the prisoner's discharge for such mal-practices should have been a creditor at the time. For the legislature did not furnish that ground of objection on account of the interest of the particular creditor who urges it, but on public policy, to prevent a person

(a) *Rex v. Mason*, 2 Term Rep. 581.

(b) *Rex v. Clayton*, 3 East, 58.

guilty of such immoral conduct from being let loose again upon the public to continue his depredations. We may therefore hope that this objection will not be started again. There was also another objection taken, founded upon *The King v. Mason*, which need not be repeated on any future occasion; namely, the not stating what the false pretences were for which the prisoner was remanded: for that was the case of an indictment upon the statute of *Geo. 2.* where it was holden to be necessary to state what the false pretences were, in order to give the party an opportunity of knowing against what he was to defend himself. But the other objection to the recited order, on which the order in question is bottomed, is clearly valid for the defect pointed out, in not stating that the false pretence was made *knowingly and designedly*, as the former act describes it, or at least *fraudulently*, as the offence is described in the latter act. A man may innocently obtain goods on a pretence which is false, if he do not know that it is false: as if a servant, ignorant of the deceit, be sent by his master for goods upon a false pretence, which he directs him to make.

Per Curiam. Let the order of sessions be quashed; and the objection will be left entire, to be substantiated by competent evidence when the party is brought up again before the sessions.

1807.

—
The KING
against
TOMKINS.
[184]

DOE, on the Demise of LOCKWOOD, *against* JOHN
CLARKE and BROWN.

[185]
Wednesday,
Jan. 28th.

IN this ejectment, tried before *Heath J.* at the last assizes for *Essex*, it appeared that *Lockwood* had leased the premises in question, a farm house and land, on a lease, dated 16th *January* 1800, to *Thomas Clarke*; “habendum from *Michaelmas* 1800, for 21 years, if the said *T. Clarke* and his executors, &c. should

Where one leased for 21 years, if the tenant, his executors, &c. should so long continue to inhabit

and dwell in the farm-house, and actually occupy the lands, &c. and not let, set, assign over, or otherwise depart with the lease: held that the tenant having become bankrupt, and his assignees having possessed themselves of the premises and sold the lease, and the bankrupt being out of the actual possession and occupation of the farm, the lessor might maintain ejectment without a previous re-entry, the continuance of the term itself being made to depend upon the lessor's actual occupation.

1807.

DOE
against
CLARKE.

so long continue to inhabit and dwell with his and their family and servants in the said farm-house, and he, his executors, &c. should so long continue actually to hold and occupy the said farm, lands, and premises, and not let, set, assign over, or otherwise depart with this present lease, or the farm and premises, or a part thereof, to any person whatever." There was also a covenant not to underlet, sell, assign, or otherwise depart with the demised premises, or any part thereof. And there was a proviso, "that if any of the said covenants should be broken, the lessor might re-enter, and from thenceforth the said lease should cease and be void." It was proved that *Thomas Clarke* became a bankrupt, and that the defendants, as his assignees, and with his approbation and consent, sold the lease for 1,200*l.* And that one *Wright*, by the appointment of the defendant *Brown*, managed the farm as his bailiff or agent. There was other evidence in the cause offered to shew other breaches of covenant; but no question was raised on them; and a verdict was taken for the plaintiff: reserving the question, whether this were such an assigning over, &c. or otherwise departing with the lease as entitled the lessor of the plaintiff to recover.

[186]

¶ *Curwood*, in the last term, obtained a rule nisi for setting aside the verdict; and then stated another objection, which he conceived to have been reserved; that this was the case of a forfeiture for a condition broken, and that the lessor should have re-entered before he brought his ejectment.

The Court, however, on hearing the report of the learned judge now read, were clearly satisfied that there was no foundation for any objection; and they stopped *Garroze*, who was to have opposed the rule. And it was only now suggested by *Curwood*, that this was an assignment in invitum, which ought not to prejudice the tenant.

LORD ELLENBOROUGH C. J. If at the time of the ejectment brought, *Thomas Clarke*, the bankrupt, had ceased to continue dwelling in the farm house, and no longer had the actual occupation of the farm, the lease of which had been actually sold by the assignees, and another person had the management of it, it is clear that there was an end of the term, which was only made to enure so long as the tenant, who is still living, continued in the actual occupation of the premises. This is

not

not the case of a forfeiture; but his actual occupation is a condition annexed to the lease; and it was considered in *Doe v. Carter (a)*, as a settled point, that such a condition *would be good to determine the lease in cases of bankruptcy.

LAWRENCE J. If this had been a question of forfeiture, there might have been something in the objection; but here the term itself is made to continue and depend upon the personal occupation of the lessee. It is like the case of a lease for 21 years, if the lessee shall so long live, there if he die before the 21 years run out, there is an end of the term. Here the lease in effect is for 21 years if *Thomas Clarke* shall so long live in the house. Then if he had ceased to live there, from whatever cause, the condition on which the term was made to determine has happened, and there is an end of his interest in the premises.

The other Judges concurring,

Rule discharged.

(a) 8 *Term Rep.* 57. and 300. where all the prior cases are collected. And vide *Doe v. Hawke*, 2 *East.* 481.

1807.

DOE
against
CLARKE.
*[187]

ELDEN, Administrator of ELDEN, against KEDDELL.

Wednesday,
Jan. 28th.

THE plaintiff brought an action for money had and received to his use, as administrator of his father, under letters of administration dated in *June* 1806; and proved by a broker who was employed in 1791, soon after the intestate's death, to value his property, that he had valued effects in a public-house which had been kept by the intestate, and that the publican who succeeded him had paid 113*l.* for them into the hands of the defendant,* a brewer, who had supplied the house with beer, and who appeared to act on the occasion as the friend of the intestate's widow. And by another witness it appeared that the defendant was a creditor of the intestate to a larger amount than the sum so received. On the part of the defendant it was proved, that immediately after the intestate's death

The original book of acts, directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party to whom the administration is directed to be granted of the intestate's effects,

without producing the letters of administration themselves; notwithstanding subsequent letters of administration granted to another: the first not being recalled.

VOL. VIII.

L

in *[188]

1807.

—
 ELDEN
against
 KEDDELL.

in 1791 his widow went to the surrogate's office at *Rochester* for the purpose of administering to his effects. And the proper officer produced in evidence the original book of acts, with the fiat of the surrogate for letters of administration to be granted to her. The entry was as follows.—“ *Elden Edw.*—“ On the 18th day of *April* 1791 power was granted to *Eliza-beth Elden*, the lawful widow and relict of *Edward Elden*, “ late of the parish of *Chalk*, in the county of *Kent*, victualler, “ deceased, to administer the goods, chattels, and credits of the “ said deceased, she having been first sworn duly to administer. “ Till the last day of *July* to exhibit an inventory.” “ Same “ day bond from *Elizabeth Elden*, widow, *Matthew Dawson* “ and *John Clay*, under 100*l.*” But as the letters of administration themselves were not produced, nor evidence of any search having been made for them since the widow's death, the evidence tendered was deemed insufficient, and a verdict for 11*9l.* passed for the plaintiff at the trial before *Macdonald C. B.* at the last assizes for *Kent*, with leave to the defendant to move for a new trial. And a rule nisi for setting aside the verdict having been obtained in the last term, *Best Serjt.* and *Lawes* appeared now to shew cause against it; and *Garrow* and *Bayley Serjt.* in support of it. But on hearing the report read,

[189]

Lord ELLENBOROUGH C. J. said, that it could not be questioned but that the original book of acts of the Court, which was the authority for the proper officer afterwards to make out the letters of administration, was proper evidence of the title of the widow: for the letters of administration, were only the copy of the original minutes of the court, drawn up in a more formal manner. That he had known this evidence produced on other occasions. And, in answer to a suggestion, that by the grant of the subsequent letters of administration to the son it was to be presumed that the administration before decreed to be granted to the widow was recalled or cancelled; he said it was enough that administration de facto was granted to the widow, pending which the money may have been paid to the defendant by her authority.

Per Curiam,

Rule absolute (a).

(a) Vide *Bull. N. P.* 246. which cites *Garrett v. Lister*, 1 *Lev.* 25. where this point was ruled; contrary to *Bull. N. P.* 108. referring to *Lev. is*

Lewis v. Brag, M. 16 Geo. 2 cor. *Lee C. J.* at *Guildhall*; where it is said that the administrator shall not be permitted to give such book, or a copy of it in evidence, unless he have proved the administration under the seal of the Court lost.

1807.

—
ELDEN
against
KEDDELL.

[190]

GOODRIGHT, on the Demise of PETERS, against
VIVIAN.

Thursday,
Jan. 29th.

THIS ejectment, to recover possession of an estate in the parish of *Philleigh* in *Cornwall*, was brought upon the ground of a forfeiture, alleged to have been incurred by the defendant's committing waste in cutting down *timber trees*, contrary to a proviso in the lease under which he held the premises. The lease contained, amongst others, this exception; "*Except and always reserved out of these presents and the demise and lease hereby made, all trees of oak, ash, and elm, now growing, or hereafter to grow in or upon the said demised premises, or any part thereof.*" It also contained a proviso, that "if the defendant should commit any waste in or upon the said demised premises, it should be lawful for the lessor to re-enter." The plaintiff's witnesses proved at the trial that the trees in question of the description mentioned, and in number about 20 or 30, grew in a coppice wood of an acre and a half, *parcel of the demised premises*, and were disposed of, while standing, by public sale, together with the coppice wood, and were by the purchaser cut down, or barked for the purpose of cutting. Some of the trees grew from old stools; others were maiden trees, some above 40 years growth; but all were 24 inches or upwards in girth, which, by the custom of that country, are deemed timber. The jury found a verdict for the plaintiff on the merits: but as it appeared by the lease that all the *trees* of oak, &c. were *excepted* out of the demise, the question whether they could be the subject of waste was saved to the defendant; with liberty to move to enter a nonsuit, if the Court should think the action not maintainable. Such a rule was accordingly moved for in the last term, when several authorities were cited by *Gaselee*, to shew that waste could not be committed upon any subject matter excepted out of the demise. 11 H. 4. 32. b.

If trees be excepted out of a demise, waste cannot be committed by cutting them down; and therefore ejectment cannot be brought as for waste committed in or upon the demised premises.

[191]

1807.
 —
 GOODRIGHT
against
 VIVIAN.

noted in 22 *Vin. Abr.* 448. tit. *Waste* G. pl. 8. *Dy.* 19 a. pl. 110. cites *E. 20 Eliz. C. B. Bull. N. P.* 119. In *Lewknor v. Ford* 1 *Leon* 48. the only question was, whether the exception of the trees by the lessee in his assignment were good.

Dampier (*Lens* Serjt. was with him) now shewed cause against the rule, and contended, on the authority of *Whilster v. Paslow* (a), that only the trees themselves, and not the soil, were excepted; which was shewn further by the reservation to the landlord of free ingress and regress to cut down and remove the trees. And therefore the soil, for which the ejectment was brought, might be forfeited. In *Lord Rich v. Makepeace* (b), though trees were excepted, it was determined that the lessee had liberty to take the loppings for fireboot. [Lord *Ellenborough* C. J. I do not understand how, if the trees were excepted, the lessee could be entitled to any part of the trees without some other words.] At least he has an interest in the shade of the trees. Then the effect of cutting down the timber is to alter the nature of the ground, and to convert wood into coppice, thereby destroying the evidence of the land; which of itself is waste; as if he convert arable into wood, or wood into meadow. *Co. Lit.* 53. b.

[192]

The Court however, without hearing the defendant's counsel were clearly satisfied that waste could only be committed of the thing demised: and here the trees being excepted out of the demise no waste could be committed of them, and consequently no forfeiture could be incurred by cutting them down, within the provision of the lease. That as to altering the evidence of the land, the cutting down of an adjoining wood, on which the demised close was described as abutting, might as well be contended to be waste.

Rule absolute.

Sir *P. Gibbs*, *Burrough*, and *Gaselee*, were to have supported the rule.

(a) *Cro. Jac.* 487.

(b) *Noy*, 29. This case was also cited to shew that if the lessee cut any tree, waste would lie as well for the loppings as for the body of the tree: and so the case is stated in 22 *Vin. Abr.* 441. but the word waste is interpolated in the latter book; for the report runs thus, "If he cut any tree, it shall be (some word omitted, probably *trespass*) as well for the loppings as for the body of the tree." This was adverted to by the defendants counsel,

1807.

The KING *against* LUFFE.*Saturday,*
Jan. 31st.

AN order of bastardy returned into this court by certiorari was as follows. *Suffolk* to wit.—The order of S. K. and J. H. two of H. M. justices of the peace, &c. made the 20th of *August* 1806, concerning a male bastard child lately born in the parish of *Benhall*, (in the said county) on the body of *Mary Taylor*, wife of *Jonathan Taylor*, late of *B.* aforesaid, mariner. Whereas it appeareth unto us, the said justices, *upon the oath of the said Mary Taylor, as otherwise*, that her husband hath been beyond the seas, and that she did not see her said husband or *had access to him* from the 9th of *April* 1804, until the 29th of *June* last past: And whereas it hath also appeared unto us, the said justices, as well upon the complaint of the churchwardens, &c. of *Benhall*, as upon the oath of the said *Mary Taylor*, that she, the said *Mary Taylor*, on or about the 13th of *July*, now last past, was delivered of a male bastard child in the said parish of *Benhall*, and that the said male bastard child is *likely to become chargeable* to the said parish of *Benhall*: And further, that *H. Luffe* of *Benhall*, &c. did beget the said bastard child on the body of her, the said *Mary Taylor*: And whereas the said *H. Luffe* hath this day appeared before us, but hath not shewn any cause why he should not be adjudged the reputed father of the said bastard child: We therefore, *upon examination* of the cause and circumstances of the premises, as well *upon * the oath of the said Mary Taylor, as otherwise*, do hereby adjudge him, the said *H. Luffe*, to be the reputed father of the said bastard child; and do also adjudge that the said bastard child was born in the said parish of *Benhall*. And thereupon we do order, as well for the better relief of the said parish of *B.* as for the sustentation and relief of the said bastard child, that the said *H. Luffe* shall forth-

1. An order of bastardy stated to be made upon the oath of the wife *as otherwise*, is good; for it will be presumed that the non-access of the husband was proved by competent witnesses on oath other than the wife; or if proved by her also, that the judgment of the justices was founded on the other proof.

2. Such an order filiating the child of a married woman is good, though it only state that such child was *likely to become chargeable*; which are the words of the stat. 6 G. 2. c. 31.

s. 1. as applied to the bastards of

single women: for upon that statute, as well as the stat. 18 Eliz. c. 3. which has the words *born out of lawful matrimony*, the only question is whether the child be by law a bastard.

3. Non access of the husband need not be proved during the whole period of the wife's pregnancy: It is sufficient if the circumstances of the case show a natural impossibility that the husband could be the father; as where he had access only a fortnight before the birth.

* [194]

1807.
 ———
 The KING
against
 LUFFE.

with, upon notice of this our order, pay to the said churchwardens, &c. of the parish of *B.* 2*l.* 3*s.* 6*d.* for and towards the lying in of the said *Mary Taylor*, and the maintenance of the said bastard child, to the time of making this our order. And we do also hereby further order that the said *H. Luffe* shall likewise pay to the churchwardens, &c. of the parish of *B.* for the time being, 3*s.* weekly, &c. for the maintenance, &c. of the said bastard child, so long time as the said bastard child shall be chargeable to the said parish of *B.* And we do further order that the said *Mary Taylor* shall also pay, or cause to be paid to the said churchwardens, &c. of the said parish of *B.* for the time being, 1*s.* 6*d.* weekly, so long as the said bastard child shall be chargeable to the said parish of *B.*, in case she should not nurse and take care of the said child herself." (Signed and sealed by the justices. The defendant appealed against the order to the quarter sessions, by which court it was confirmed.

[195]

Three objections were taken to this order (*a*); 1st, That the wife was admitted to prove the non-access of her husband. 2dly, That this being the child of a married woman, the justices had no jurisdiction to make an order of filiation, unless the child appeared to have been actually chargeable, and not merely likely to become so. 3dly, That the non-access of the husband was not proved during the whole time of the wife's pregnancy; which was necessary to bastardize the issue.

Storks shewed cause against the rule for quashing the order. As to the first objection; the non-access of the husband does not rest upon the evidence of the wife alone; nor does it even necessarily appear that she gave any evidence of that fact. The words of the order are that it appeared to the justices, *upon the oath of the said Mary Taylor, as otherwise*, (by which must be understood other legal proof), that her husband had been *beyond sea*, and that she had not seen him, or had access to him, &c. And the words *as otherwise*, occur again in the subsequent part of the order. It was long ago decided in *Pendrell v. Pendrell* (*b*), and *Rex v. Bedall* (*c*), that non-access may be proved

(*a*) The presence of the defendant in court was waved by consent. Vide *Rex v. Mathews*, *Salk.* 475.

(*b*) 2 *Stra.* 925.

(*c*) 1*b.* 941. 1076. *Rep. temp. Hardw.* 379. and *Andr.* 9.

to bastardize the issue, though the husband be in *England*; and the old doctrine of the *Quatuor Maria* (a) was agreed to be exploded. And in the latter case, the order being stated to be made “on the examination of the wife and on other proof,” it was holden to be good; though it was agreed that the evidence of the wife alone to prove non-access would not have been sufficient, according to the case of *The King v. Reading*; but that she was a witness from necessity to prove the criminal conversation. It appears by the report of *Rex v. Reading* (b), that the wife was the only witness to prove the non-access, as well as the criminal intercourse; and Lord *Hardwicke* said, “it would be of dangerous consequence to lay it down in general that a wife should be a sufficient sole evidence to bastardize her child, and to discharge her husband of the burthen of its maintenance.” Upon the authority of that case, the order was quashed in *The King v. Rook* (c); it having been made upon the sole evidence of the wife as to the non-access. Both those cases, therefore, are distinguishable from the present. The 2d objection is grounded on this, that the stat. 6 G. 2. c. 31. s. 1. which gives jurisdiction to magistrates to take examinations for making orders of filiation in case of bastards *likely to become* chargeable, is confined in terms to the bastards of *single women*. But this order would at any rate be good on the general statute of the 18. *Eliz.* c. 3. which gives the magistrates jurisdiction to filiate bastards “begotten and born out of lawful matrimony.” And it was determined in *Rex v. Albertson* (d), that a bastard begotten on the body of a feme covert while her husband was beyond the four seas, was “begotten and born out of lawful ma-

1807.

—
The KING
against
LUFFE.

[196]

(a) Vide *Co. Lit.* 244. a. and 123. b. to 125. 129. in which the whole doctrine is discussed in the notes.

(b) *Rep. temp. Hardw.* 79. 2 *Sess. Cas.* 175. and *Andr.* 10. *Ford's MS.* states the facts thus, “*John Alman* was husband of *Mary Alman*, and leaving her upon the 25th of *May* 1731, had no access to her from that time till the 25th of *May* 1733, upon which day she was delivered of a bastard child begotten by the defendant *Reading*: all which was proved by the evidence of *Mary Alman*. There were other witnesses who proved that the husband was within seven miles of his wife during that time.”

(c) 1 *Wils.* 340.

(d) 2 *Salk.* 483. 1 *Ld. Ray.* 395. and *Carth.* 469.

1807.

The KING
against
LUFFE.
*[197]

trimony." And in *Rex v. Taylor (a)*, the mother of a bastard was after her marriage holden to be still liable to be committed for * disobedience to an order of maintenance made under the statute of *Elizabeth*. According to *Rex v. Mathews (b)*, and an anonymous case in 10 *Mod.* 84. it is not even necessary to state in the order that the bastard child is likely to become chargeable; for that, say the Court, will be presumed. And in *Rex v. Nelson (c)*, though it were agreed, that it ought to appear by the order that the child was likely to be chargeable; yet that, it was said, sufficiently appeared by the order to pay such charges as the parish had been at. As to the 3d objection, that the child was born after access of the husband; the birth of the child was on the 13th of *July* 1806, and the fact of non-access stands proved from the 9th of *April* 1804 until the 29th of *June* 1806: the access, therefore, of the husband was not till within about a fortnight before the birth; which renders it impossible, in the course of nature, that he could have been the father. In support of this objection were cited at the time *Regina v. Murray (d)*, and *Rex v. Albertson (e)*, to shew that non-access must be proved during the whole time of pregnancy, in order to bastardize the issue. But those cases were decided upon the ground of the old rule of the *quatuor maria*, now exploded by the subsequent cases of *St. Andrew's v. St. Bride's (f)*, *Pendrell v. Pendrell (g)*, *Rex v. Lubbenham (h)*, and *Goodright v. Saul (i)*. Besides, the Court will presume every thing in favour of an order: and where it is apparent from the facts stated that the defendant is the father of the child, they will not, by quashing the order, make the husband liable to maintain it.

[198]

Wilson, Alderson, and King, contra. As to the first objection, it has been clearly settled since *The King v. Reading*, that the wife is not a competent witness to prove the non-access of her husband, though from the necessity of the case she is admitted to prove the act of adultery. And it is no answer to say that she was not the *sole* witness; and that the fact of non-access may have been proved by other evidence, by reason that

(a) 3 *Burr.* 1679.(d) *Salk.* 122.(g) 2 *Str.* 925.(b) 2 *Salk.* 475.(e) 1 *Ld. Ray.* 395.(h) 4 *Term Rep.* 251.(c) 1 *Ventr.* 37.(f) 1 *Str.* 45.(i) *Ib.* 356.

1807.

—
The KING
against
LUFFE.

the order is stated to have been made upon her examination upon oath, *as otherwise*: for it expressly appears that the non-access was proved by her: And though it were also testified by other evidence, (which other evidence, however, does not necessarily appear to have been upon oath); yet the judgment of the magistrates, which must be taken to have been formed upon all the evidence taken together, cannot be sustained if part of that evidence were incompetent to be received; for the Court cannot tell what degree of weight was given to her testimony as to the fact of non-access in coming to the conclusion.

The 2d objection was only argued by some of the defendant's counsel, on the words, "*born out of lawful matrimony*," in the statute of *Elizabeth*, and on the words, "*single woman*," used in the stat. 6 *Geo.* 2. neither of which, they said, applied to the illegitimate child of a married woman. But this objection, being discountenanced by the Court for the reasons after stated, was ultimately abandoned. 3dly, The law presumes access, and the proof of non-access must come from the party disputing the legitimacy. The mode of proof was formerly very plain and precise; for unless the husband were proved to be beyond the four seas, or labouring under some personal disability, the children were deemed legitimate. If, says Lord *Coke* (a), "the issue be born within a month, or a day after marriage, between parties of full lawful age, the child is legitimate." The law, therefore, never looked to the period of conception, or to the actual possibility of the husband having begotten the child, but only to the notorious fact of its birth during the marriage, and while the husband was within the four seas (b). The doctrine, indeed, of the *extra quatuor maria*, is now obsolete; and is supplied by the positive proof of non-access, though the husband be in *England*: but so much of the old rule of law still holds, that if access be proved at any time between the possible conception and the birth, the child is legitimate. So Mr. Justice *Blackstone* (c), speaking of the old doctrine, says; "If the husband be out of *England*, (or, as the law so somewhat loosely phrases it, *extra quatuor maria*) for above nine months, so that no

[199]

(a) *Co. Lit.* 244. a.

(b) Many cases were referred to, which are collected in 4 *Vin. Abr.* 21. letter B, pl. 3, 4, 5, and 6.

(c) 1. *Blac. Com.* 457.

1807.

—
The KING
against
LUFFE.

access to his wife can be presumed : her issue *during that period* shall be bastards. But generally (he adds, with reference to the later determinations engrafted on the old rule,) during the coverture, access of the husband shall be presumed, unless the contrary can be shewn ; which is such a negative as can only be proved by shewing him to be elsewhere." [Lord *Ellenborough* C. J. Suppose a husband, who had been out of reach of access during the whole period of the wife's possible gestation, returned to his wife the very instant before her actual delivery, can it be contended that the child would in such case be legitimate? The ground insisted upon in the case of *The Queen v. Murray*, was a little slurred by Mr. Justice *Lee*, in *The King v. Reading*. If the fact be once ascertained that it is naturally impossible, (I do not say *improbable* merely) that the husband should be the father of the child, the conclusion follows, that the child is a bastard. There is a very early case of *Foxcroft* in the time of *Ed. 1. (a)*, where an infirm bed-ridden man was privately

[200]

(a) *E. 10 Ed. 1. B. Rot. 23. 1 Rol. Abr. 359.* It is to be observed, however, that as the case is stated in *Rolle, R.* the infirm bedridden man *was married* to *A.* by the bishop of *London* privately, *in no church or chapel, nor with the celebration of any mass* ; " *le dit A. Esteant adonque pregnant del tit R.*" &c. Now if by the word *del* it be meant that *A.* was pregnant *by* the man whom she afterwards married (and the words are so construed in other abridgments); assuming that there was a marriage the case is scarcely intelligible ; for it is contrary to the whole current of decisions to say that a child *born after* the marriage of its actual parents, if *begotten before*, is a bastard : And if *R.* were in truth the father of the child begotten some time before, it was a matter of no consequence how infirm of body he was at the time of his marriage, only 12 weeks before the birth ; and yet stress is evidently laid upon his circumstance in the statement of the case. But if, by the mention of the privacy of the marriage, and that it was in no church, &c, it were meant to question its validity for want of a proper ceremonial, the infirmity of the man's body at the time was equally immaterial, and the case itself not worth noticing ; as amounting only to this, that the issue of persons not married according to the requisite ceremonies of the law, or in other words, not married at all, are bastards. And if Lord *Rolle* had considered that to be the point in judgment, it is singular that he should not have drawn exclusive attention to it by some more appropriate turn of expression, than by saying that *R.* was married

1807.

 The KING
 against
 LUFFE.

privately married to a woman, who, within 12 weeks after, was delivered of a son; and the issue was adjudged a bastard. The principle to be deduced from the cases is, that if the husband could not by possibility be the father, that is sufficient to repel the legal presumption of the child's legitimacy. But if the mere fact of access of the husband at any time between the moments of conception and delivery would make the child legitimate, it would have been an answer to many of the cases where legitimacy has been in question.] No other certain time can be drawn than that laid down in *Regina v. Murray* (a), and *Rex v. Albertson* (b). In the latter case it is said, "He is a bastard who is born of a man's wife while the husband, *at and from the time of the begetting to the birth*, is *extra quatuor maria*;" or, as it is now understood, is proved to have had no access during that period. And in the report of the same case in *Carthew*, the 3d exception to the order, on which it was quashed, was that it was not alleged that the husband was beyond sea for 40 weeks before the birth of the child; and that it would not be sufficient to say that he was beyond sea at the time of the conception: because that in nature could not certainly be known. [Lord *Ellenborough* C. J. Here, however, in

married privately, &c. in conjunction with the other circumstances of the case. Quære then, whether there may not be some error of the pen, or of the press? for though the relative word *dit* supports the allusion to the husband *R.*; there being but one *R.* before mentioned; yet in abstracting the record, as it is likely enough that the son was of the same name with the supposed father, this error may have crept in without attracting attention. The word *del* properly signifies *of*, and *pregnant del*, &c. is *pregnant of*, &c. and not *by*, &c. And Lord *Rolle*, in other places under the same head, speaking of pregnancy, in relation to the husband or father, uses the phrases, *enseint per A.*" "ad issue *per* *luy*;" "ad issue *per B.*;" while the word *del* is plainly used in its common sense for *of*, in several sentences immediately preceding. And in this sense only, speaking of the woman as *pregnant of R.* the issue, is the case intelligible, or likely to have been noted in that place or manner: in which sense Lord *Ellenborough* seems to have read the case. There is no regular year book of this period to refer to, but only a few scattered notes, not including this case.

(a) *Salk.* 122.(b) 1 *Ld. Ray.* 395. *Salk.* 484. *Carth.* 469.

1807.
 —
 The KING
against
 LUFFE.

nature the fact may certainly be known, that the husband who had no access till within a fortnight of his wife's delivery, could not be the actual father of the child. Where the thing cannot certainly be known, we must call in aid such probable evidence as can be resorted to, and the intervention of a jury must, in all cases in which it is practicable, be had to decide thereupon: but where the question arises as it does here, and where it may certainly be known from the invariable course of nature, as in this case it may, that no birth could be occasioned and produced within those limits of time, we may venture to lay down the rule plainly and broadly, without any danger arising from the precedent.] The same case of *Rex v. Albertson* is reported in 5 *Modern*, 419. (a), and there *Holt C. J.* is made to say that it must appear that the husband was not here all the space; for if he were here either at the begetting or *at the birth of the child*, it is sufficient. And this falls in with the established rule of law, which has never been questioned, that if a man marry a pregnant woman any time before the birth of the child, such child is legitimate. Then by analogy to that, if the husband have access any time before the birth of the child, the same construction must prevail.

[203]

Lord ELLENBOROUGH C J. Three exceptions have been taken to this order; 1st, That the wife was examined generally and alone to the fact of non-access, and that the order is founded on her evidence only; whereas it is laid down in the cases that an order of this sort cannot be made on the evidence of the wife alone, but that there must be other proof of the non-access. This objection is grounded upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter affecting his interest or character, unless in cases of necessity, where, from the nature of the thing, no other witnesses can probably have been present: but exceptions of that sort have been established: and that it is necessary, and on that account allowable, to examine her as to the fact of her criminal intercourse with another, has been held by various Judges at different periods; for this is a fact which must probably be within her own knowledge and that of the adulterer only. And by a parity of reasoning it should

(a) Under the name of *Alenson v. Spence*,

1807.

The KING
against
LUTFE.

[204]

seem that if she be admitted as a witness of necessity to speak to the fact of the adulterous intercourse, it might also perhaps be competent for her to prove that the adulterer alone had that sort of intercourse with her, by which a child might be produced within the limits of time which nature allows for parturition. Certainly, however, it is competent for her to prove the fact of her connexion with that person whom she charges as being the real father of her child. And here the order is stated to have been made, not on her evidence only, but “upon the oath of the said *Mary Taylor*, as otherwise.” It is true that it is not said, “as otherwise upon oath;” but as no evidence can properly be given otherwise than upon oath, it is not going further in making an intendment to support this order than has been done in other cases, to say that such other evidence must also be taken to have been given upon oath. Now it does not appear to what particular facts the wife deposed, or what were proved by the other evidence: and then the rule laid down in *The King v. Bedall* applies, that if there were other witnesses besides the wife and she were competent to prove any part of the case, the Court will intend, in support of an order framed like the present, that she was examined only as to those facts which she was competent to prove, and that the rest of the case was proved by the other evidence. And this is not more than has been intended in many other cases. We may therefore read the adjudicatory part of the order as made “upon examination, &c. of the premises upon oath, as well of the said *Mary Taylor*, as otherwise.” The 2d exception, which arose on the wording of the statutes of *Elizabeth* and *George* 2d, in effect resolves itself into the third. For when the question is whether this were a child *born out of lawful matrimony*, that is, out of the limits and rights belonging to that state, it is the same in substance as the question, whether it be a *bastard*. It is so for the general purposes of the act. The matrimony does not cover the child if it be in *other* respects (according to the rule of law applicable to this subject) a *bastard*. And so it seems that a child born by adulterous intercourse is as much within the provision of the act of *Geo. 2.* as one which is born of a single woman. The cases of *The King v. Reading* and *The King v. Bedall*, were both after the statute of *Geo. 2.* and yet no such objection was taken. It is a consequence which follows of course

1806.

—
The KING
against
LUFFE.

[205]

[206]

course from establishing the *bastardy* of the child, that it was born out of *lawful matrimony*, in the proper sense of those words as applied to the subject matter. This brings it to the 3d and principal exception; that as it appears that the husband returned within access of the wife about a fortnight before the child was born, he must be presumed to be the father of it; which will throw upon him the burden of its maintenance. As something has been said concerning the novelty of the doctrine of admitting the proof of non-access of the husband living within the kingdom, in order to rebut the presumption of legitimacy, let us see how the law was understood to be in early periods. In 1 *Rol. Abr.* 358. tit. *Bastard*, letter B. it is said, "By the law of the land no man can be a bastard who is born after marriage, *unless for special matter*." Therefore in the very text of the rule an exception is introduced. The first special matter of exception mentioned by *Rolle* to bastardise the issue, where the husband is within the reach of access, is one of a natural impossibility; where the husband is within the age of puberty; though that was no obstacle to the marriage. There is a case in the year-book 1 *H. 6.* 3. b. which goes the length of deciding the issue to be a bastard, where the husband was within the age of 14. There are several other cases mentioned from the year-books, of course less questionable, as the age in those cases was much less. All these establish this principle, that where the husband in the course of *nature could not* have been the father of his wife's child, the child was by law a bastard. But *Foxcroft's* case (a), p. 359. of the same book, which I before mentioned was the case of an infirm bed-ridden man, who having married in that state 12 weeks before the delivery of his wife, that was holden to bastardize the issue, though the parties were together. And no doubt is thrown on the principle of that case in any subsequent authority, nor even in the learned editor's notes on *Co. Lit.* 244. a. 123. b. &c. This therefore is another instance of an exception to the general rule, admitted at so early a period as the 10 *Ed.* 1. and founded on natural impossibility arising from bodily infirmity. There is another case in the 18 *Ed.* 1. also mentioned in *Rol. Abr.* (p. 356.) still stronger to the present purpose; where the child was found to be born 11 days post

(a) Vide *ante*, 200, note (a).

1807.

The KING
against
LUFFE.

ultimum tempus legitimum mulieribus pariendi constitutum; and because of that fact, et quia per veredictum juratorum invenitur quod prædictus Robertus (the husband,) non habuit accessum ad prædictam Beatricem per unam mensem ante mortem suam, *per quod majis presumitur* contra prædictum Henricum (the issue,) &c. therefore the brother and heir of Robert had judgment to recover in assize. Even at that time, therefore, it was considered that the fact of access or non-access was a material question to be gone into; and that the period of time which had elapsed between the non-access and the birth which only goes to establish the natural impossibility of the husband being the father of the child, was proper to be inquired of. And Lord C. J. *Rolle* adds a *note* to that case, that the jury found that the husband *languished of a fever long before death*: which shews that the natural impediments to any access arising from his languishing of a fever some time before his death, was also considered as an ingredient in the question which was submitted to the jury. The rule of law which has prevailed in these cases is (a), “*Stabatur huic præsumptioni donec probetur in contrarium. Ut ecce, maritus probatur non concubuisse aliquamdiu cum uxore, infirmitate vel aliâ causâ impeditus, vel erat in ea invalidudine ut generare non possit.*” From all these authorities I think this conclusion may be drawn, that circumstances which shew a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded. And therefore, if we may resort at all to such impediments arising from the natural causes adverted to, we may adopt other causes equally potent and conducive to shew the absolute physical impossibility of the husband’s being the father: I will not say the improbability of his being such; for upon the ground of improbability, however strong, I should not venture to proceed. No person, however, can raise a question, whether a fortnight’s access of the husband, before the birth of a full grown child, can constitute in the course of

[207]

(a) *Bracton*, p. 6. a.

1807.

—
The KING
against
LUFFE.

nature the actual relation of father and child. But it is said, that if we break through the rule insisted upon, that the non-access of the husband must continue the whole period between the possible conception and delivery, we shall be driven to nice questions. That however, is not so; for the general presumption will prevail, except a case of plain natural impossibility is shewn: and to establish as an exception a case of such extreme impossibility as the present cannot do any harm, or produce any uncertainty in the law on this subject. As to the case of *Regina v. Murray*, relied on for the position contended for; on which case alone *The King v. Albertson* proceeded; the ground of it was discountenanced by Mr. Justice Lee in *The King v. Reading*. Without weakening, therefore, any established cases, or any legal presumption, applicable to the subject, we may without hesitation say, that a child born under these circumstances is a bastard. With respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar ground. The marriage of the parties is the criterion adopted by the law, in cases of ante-nuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage.

[208]

GROSE J. As to the 1st and 2d objections which have been made, I shall content myself with referring to the answers given to them by my Lord. But in respect to the 3d objection, as we have been warned not to break in upon the common law, without some rule to go by, I shall make a few observations upon it. It is said that if we break in upon the old rule of the quatuor maria, we must adopt some other line, which will be difficult to be drawn. But that rule has been long exploded on account of its absolute nonsense; and we will adopt another line, which has been marked out on account of its good sense. In every case we will take care, before we bastardize the issue of a married woman, that it shall be proved that there was no such access as could enable the husband to be the father of the child. If by reason of imbecility, or on any personal account, or from absence from the place where the wife was, the husband could not be the father of the child, there is no reason why it should

not

not be so declared. Here it is apparent that the husband, who had no access to the wife till two weeks before her delivery, could not be the father. And in saying so we go upon the sure ground of natural impossibility and good sense; rejecting a rule founded in nonsense.

1807.

—
The KING
against
LUFFE.

[209]

LAWRENCE J. The objections are reduced to two. The first is, that this order is made upon the evidence of a married woman, that her husband had no access to her: and *The King v. Reading*, and *The King v. Rooke*, have been relied on. But those cases are not broken in upon by sustaining the present order; because it was made on other evidence besides that of the wife. It is stated to have been made on examination of the wife on oath, *as otherwise*; by which I understand on other legal proof besides her evidence. But it is said that we can make no intendment in support of this, which is more in the nature of a conviction for an offence than of an order. That, however, is not so, and is contrary to the determination in *The King v. Bedall*; between which and the present case there is no distinction, except that there the order was stated to be made “upon examination of the wife *and other proof upon oath*;” the only question, therefore, is, whether the words “*as otherwise*,” here used, must not be taken to mean *other proof upon oath*; for if they can, the cases are parallel. Though if orders can be made in any cases without oath, which I do not know that they can, still this would be good as an order. But suppose it had been stated in express terms, that the wife had given evidence of the non-access, and that the same fact had been proved by ten other witnesses, we should presume in the case of an order that the magistrates had proceeded upon the evidence of the other witnesses as to that fact. This case comes to us after an appeal to the sessions; and we may presume that if there had been no other evidence of non-access, than that of the wife, the sessions would not have confirmed the order. Then the 3d question is, whether, as the husband had no access until about a fortnight before the birth, a child so born can be said by our law to be legitimate. Now without going over the whole ground of the argument again, the doctrine of the *quatuor maria* has been long exploded; and it has been shewn by the authorities mentioned by my lord, that imbecility from age, and natural infirmity from other causes, have always been

[210]

1807.

—
The KING
against
LUFFE.

deemed sufficient to bastardize the issue ; all which evidence proceeds upon the ground of a natural impossibility that the husband should be the father of the child. Then why not give effect to any other matter which proves the same natural impossibility ? It is said, however, that in so doing we shall shake a settled rule of law, that if a child be born in wedlock, though but a week after the marriage of its parents, such child is to be deemed legitimate. But I do not see that the consequence supposed would follow. By the civil law, if the parents married any time before the birth of the child, it was legitimate : and our law so far adopts the same rule, that if a man marry a woman who is with child, it raises a presumption that it is his own. Lord *Rolle* gives some such reason for the rule ; and it seems to be founded in good sense : for where a man marries a woman whom he knows to be in this situation, he may be considered as acknowledging by a most solemn act that the child is his.

[211]

LE BLANC J. As to the first objection, I think it must be taken that the wife was examined to prove the fact of the non-access of her husband within the time mentioned, as well as the other witnesses ; for the particular facts proved by her and other witnesses, or by her alone, are given in detached sentences. And then the question is brought to this, whether an order of filiation, where the wife and other witnesses were examined to prove the non-access of the husband, can be supported ? To that the case of *The King v. Bedall* is in point : for there the wife, as well as other witnesses, was examined to prove that fact, (which I think appears as plainly here from the statement of the case) and yet the order was holden to be good. I consider that case, therefore, as an authority to this point. And it is more peculiarly fit to make the intendment, that the fact was proved by the other witnesses as well as by the wife, in a case like the present, where an appeal lies to the sessions from the original order of the justices ; where the appeal has been heard ? and where the objection might have been taken on the evidence, that no other than the wife had proved the non-access ; and where notwithstanding it is stated that that fact, amongst others, was proved by the wife *as otherwise* ; understanding, as I do, these latter words to mean other competent proof. The second objection has been properly abandoned

1807.

The KING
against
LUFFE.

doned; because it comes in effect to this question, whether a child proved to be a bastard be not the same, for the purpose of these acts of parliament, as a child *born out of matrimony*, or born of a *single woman*? To be sure they must be considered as the same thing. As to the 3d objection, the question will be, whether the child of a woman, whose husband is proved to have had no access to her till a fortnight before her delivery, can in law be considered as illegitimate? And our attention has been called to cases where a child born within a short time after the marriage of the parents is, by the rule of law, considered to be legitimate. That is a rule of law not to be broken in upon, except as in other cases, one of which has been mentioned, by proof of natural imbecility, which shewed that the husband could not have been the father of the child. But in order to make the cases the same, it must be supposed that the adultery of the wife in the absence of her husband, who only returns to her just before her delivery, is assimilated in law to the case of a man's marriage with a pregnant woman recently before the birth of the child, where the very act of marriage in such a situation is an acknowledgment by him that he is the father of the child with which the woman is pregnant. But there is no analogy between the two cases. It comes then to a case of non-access for a year and a half, excepting the last 14 days before delivery. The rule of law was formerly very strict in favour of the legitimacy of children born of a married woman whose husband was within the four seas; but that has been long broken in upon. Afterwards the rule was brought to this, that where there was an impossibility that the husband could have had access to his wife, and have been the father of the child, there it should be deemed illegitimate: And in *Goodright v. Saul (a)*, the Court held that there was no necessity to prove the impossibility of access, if the other circumstances of the case went strongly to rebut the presumption of access. The cases of *The Queen v. Murray*, and *The King v. Albertson*, were rather cited for the sake of expressions thrown out by some of the Judges in giving their opinions, than for the determination of the Court: for the points in judgment did not require the support of the doctrine advanced, that there

[212]

(a) 4 Term Rep. 356.

1807.

—
The KING
against
LUFFE.

[213]

must be non-access during the whole period of the wife's pregnancy in order to bastardize the issue. But where it can be demonstrated to be absolutely impossible, in the course of nature that the husband could be the father of the child, it does not break in upon the reason of the current of authorities, to say that the issue is illegitimate. If it do not appear but what he might have been the father, the presumption of law still holds in favour of the legitimacy. But if, as in this case, it be proved to be impossible that he should have been the father, then, within the principle of the modern cases, there is nothing to prevent us from coming to that conclusion.

Order confirmed.

Saturday,
Jan. 31.

The KING *against* The Archbishop of CANTERBURY.

No mandamus lies to the Archbishop of *Canterbury* to issue his fiat to the proper officer, &c. for the admission of a Doctor of Civil Law, graduated at *Cambridge*, as an Advocate of the Court of Arches.

[214]

WILSON, in the last term, applied for a writ of mandamus to the Archbishop, to issue his fiat to the vicar general of the province of *Canterbury*, for the purpose of making out a rescript under the seal of the vicar-general, commanding the dean of the arches, to admit Dr. *Higmore* as an advocate of the Court of Arches. This application was founded on affidavits stating in substance, that the Court of Arches, the Court of Peculiars, the Prerogative Court, and other ancient courts, are governed by the civil and canon law, under the jurisdiction and control of the Archbishop *Canterbury*; that the advocates of those Courts also practice in the Court of admiralty; and that no doctor of the civil law is admitted to practise in the latter who has not been previously admitted an advocate of the Court of Arches by the rescript of the Archbishop. That the mode of obtaining such admission is for the candidate to deliver his certificate of qualification, viz. of his degree of doctor of civil law, signed by the registrar of the university where taken, into the office of the vicar general of the province of *Canterbury*; where a petition is made out, praying that the candidate may, in consideration of that qualification, be admitted an advocate; which petition, being signed by the candidate, is forwarded from that office to the archbishop, who returns upon the

the same instrument his *fiat*, ordering the commission or rescript to be made out as prayed for; which, without such *fiat*, cannot be obtained. The petition and *fiat* are then returned to the vicar general; and the rescript, which orders the dean of the arches to admit the candidate as an advocate, is then made out under the seal of the vicar general, and delivered to the registrar of the province. The candidate is afterwards introduced into court by two advocates, and presented to the dean of arches, who after the archbishop's rescript is read, and the candidate has taken the oaths, admits him as an advocate of the court; declaring such admission to be in pursuance of the archbishop's rescript. The candidate is afterwards admitted in a similar manner in the Court of Admiralty. It was then stated that Dr. *Highmore* took deacon's orders in the church in 1790, but laid aside the clerical character in 1793, having never taken priest's orders; and then studied the canon and civil law; and in 1796 obtained the degree of doctor of civil law, as a regular graduate in the university of *Cambridge*, and has expended a large sum in the prosecution of these studies. That this degree is conferred by the universities indiscriminately on the clergy and laity. That the privileges of the two universities, and amongst others of the doctors and students of civil law, are secured by divers statutes, charters, and patents. That the principal advantage of the degree of doctor of civil law is the obtaining the privilege of practising in the said courts, and that such was Dr. *Highmore's* object in taking his degree. That it has been the constant practice for the archbishop for the time being to grant his *fiat* upon the petition and certificate before-mentioned; and that the advocates now practising in the said courts are doctors of the civil law. It then appeared that about *March* 1805, Dr. *Highmore* sent in to the archbishop the certificate of his degree and qualification, signed by the registrar of the university of *Cambridge*, with a petition for the archbishop's *fiat* is the usual form; not noticing, because it was not believed to be material, the circumstance of his having been in deacon's orders. On this the archbishop returned his *fiat*; and the rescript thereon being formally executed and sealed in the office of the deputy registrar of the province; Dr. *Highmore*, on the 27th of *April*, acquainted the dean of arches therewith; who informed him that having been in deacon's orders, he could

1807.

—
The KING
against
The Arch-
bishop of
CANTER-
BURY.

[215]

1807.

—
The KING
against
The Arch-
bishop of
CANTER-
BURY.

[216]

not be admitted as an advocate of that court, the same being forbidden by the canons of the church. On reference afterwards to the archbishop, the latter declined deciding on the matter, and referred the defendant to the Judge of the Admiralty for his opinion, who coincided with the dean of the arches. And on the 14th of *May* 1805 Dr. *Highmore* was informed by letter from the archbishop, that he had received an answer from Sir *Wm. Wynne* (dean of the arches), and Sir *Wm. Scott* (Judge of the Admiralty), respecting Dr. *Highmore's* application, and that they were decidedly of opinion that he could not be admitted as an advocate in Doctor's Commons. In consequence of this, as it afterwards appeared, the archbishop withdrew his fiat and caused it to be cancelled. The affidavits further stated, that the judges and advocates of the Ecclesiastical and Admiralty Courts were incorporated by charter in 1768, under the name of the College of Doctors of Law exercising in the Ecclesiastical and Admiralty Courts; and it was thereby appointed that the society should consist of a president, who should be the dean of the arches, and of such doctors of law as should be judges in those courts, or admitted to practice therein as advocates by the rescript of the archbishop of *Canterbury*; and that no one should be qualified to be admitted who had not regularly taken the decree of doctor of laws at *Oxford* or *Cambridge*, and been admitted an advocate of the Court of Arches: with a proviso saving the rights of the king's courts. And it is also provided in case of abuses or differences in the government of the society, that the Archbishop of *Canterbury*, the Lord Chancellor, the Lord Privy Seal, and the two Secretaries of State, should be visitors, with power to redress and compose them. That Dr. *Highmore*, on the 26th of *September* 1805, appealed to the visitors against the refusal of the society to admit him as a member; the fiat of the archbishop being at that time in the registrar's office: but on the 2d of *April* 1806 he received official notification from the archbishop's secretary, that as the archbishop's fiat had never been presented to the dean of the arches, and had been withdrawn and cancelled, in consequence of information to the archbishop that Dr. *Highmore* was in deacon's orders, of which his Grace was not apprised when the fiat was granted, there was no act done by the College of Doctors of Laws upon which the jurisdiction

of

of the visitors could attach. Dr. *Highmore* again applied for admission on the 30th of *June* last, on the ground of his commission having been once granted, and was again refused by the dean of arches, and by the judge of the Admiralty in their respective courts. After which he applied to the archbishop for a renewal of his fiat, which the latter declined. Dr. *Highmore* also stated, upon his information and belief, that it would appear upon inspection of the register of the society of advocates that divers persons in holy orders, both before and after the former promulgation of the canons in the reign of *James I.*, had been admitted to practise as advocates in those courts.

1807.

The KING
against
The Arch-
bishop of
CANTER-
BURY.

[217]

The Court, when this matter was first moved at the end of last term, objected to granting a rule to shew cause, for want of the relator's shewing an inchoate right to be admitted an advocate of the court: but give him leave to move the matter again in this term, if he should be so advised. Accordingly

Wilson now renewed his application for the mandamus: and, in answer to what he considered to be the principal grounds of objection, contended, 1st, that this Court had jurisdiction to interfere in the matter of a spiritual officer, notwithstanding what was said by Lord *Holt* in *Rex v. Orenden* (a), where a mandamus was refused to restore a proctor, on the ground that the king had two distinct jurisdictions; the one ecclesiastical, the other temporal; and that he did not exercise the former in this court. For there are many instances in the books of this Court interfering in matters relating to ecclesiastical officers; as *Hurst's* case (b), where a mandamus went to restore one to an attorney's place in the Court of *Canterbury*: and where mention was also made of a similar precedent, of a mandamus to restore an attorney of the Court of the Liberty of *St. Martin's le Grand, London*. The writ has also been granted at the instance of a deputy registrar (c); a schoolmas-

[218]

(a) 1 *Show.* 217. 251. 261. 3 *Mod.* 332. *Carth.* 170. 3 *Salk.* 230.

(b) 1 *Lev.* 75. But this appears, by the report of the same case in *Sir T. Ray*, 56. 94. to be meant of the town Court of *Canterbury*.

(c) *Rex v. Ward*, 2 *Stra.* 893. Vide 5 *Bac. Abr.* (G), 198. in margin. The right to the office of registrar is to be determined at common law, and not to be tried in the spiritual court; though the subject matter be spiritual; because the office itself, being *matter of freehold*, is for that reason of temporal cognizance. 2 *Roll. Abr.* 285. 4 *Mod.* 27, 8. *Carth.* 169.

1807.

The KING
against
The Arch-
bishop of
CANTER-
BURY.

[219]

ter (a); an apparitor general (b); a sexton (c); a parish clerk (d); and churchwardens (e); all of whom are spiritual officers. There is, therefore, no objection on this ground. 2dly, This is an office of a public nature. It confers a peculiar privilege to conduct causes; and the public have an interest in the free admission of those who have qualified themselves in the accustomed manner to exercise the function of advocate. The courts in which the doctors of laws claim to practice exclusively have cognizance of all matters of wills, and marriages, of prizes, and all other matters of which the Admiralty has jurisdiction. If the archbishop have a general power to deny admission, without assigning any reason, he would in effect have the power of appointing his own advocates, which would give him an undue control over them. He might refuse so many that the number practising might be reduced so low as to cause inconvenience to the public, or even until none were left. There is not, it is true, any instance of a mandamus to admit or to restore an advocate; but if it may be done in the case of an attorney, a fortiori in that of an advocate. [The Court intimated that the mandamus in those cases was probably to admit the attorney to practice in some common law court, such as the court of *St. Martin le Grand*, one of the instances mentioned.] It is contrary to the genius of the constitution to vest an absolute discretion in any person without control; but if this Court will not interfere in this case, the archbishop will have unlimited authority to reject whom he pleases, after all the expence and study of an individual to qualify himself for his profession. If the societies of the inns of court reject a

(a) *Rex v. The Bailiffs of Morpeth*, 1 *Str.* 58. Vide *Cox's case*, 1 *P. Wms.* 29. where it is considered how far the keeping of a school is of ecclesiastical cognizance; et Q.

(b) *Foulke's case*, cited 1 *Str.* 897.

(c) *Ile's case*, 1 *Ventr.* 143. and *Olive v. Ingram*, 2 *Str.* 1114. Vide 3 *Burn. Eccl. Law*, 319. title *Sexton*.

(d) Cited *ib.* and *Davis's case*, *Hil.* 4 *G.* 1. cited in 2 *Str.* 897. "But though the execution of the office concerneth Divine Service, yet the office itself is merely temporal." 13 *Rep.* 70.

(e) The case of the parish of *St. Balaunce in Kent*, and *Morgan v. The Archdeacon of Cardigan*, 1 *Salk.* 166. But a churchwarden is a temporal officer, *ib.* and vide 4 *Vin. Abr.* 525. pl. 4 in *margin*.

candidate

candidate for admission to the bar, an appeal lies to all the Judges; and the refusal of a mandamus in such a case was grounded on the existence of such domestic forum of appeal. But here is no other remedy if the Court will not interfere; for Dr. *Highmore's* appeal was refused to be heard, because he was not a member of the corporation. The only reason suggested by the archbishop for withholding his fiat was, that Dr. *Highmore* had taken deacon's orders: but there are many instances of persons so circumstanced having been admitted advocates; and the stat. 21 H. 8. c. 13. s. 28. supposes that advocates may be spiritual persons; and also shews that they are officers; for it speaks of their *offices*.

LORD ELLENBOROUGH C. J. There ought in all cases to be a specific legal right, as well as the want of a specific legal remedy, in order to found an application for a mandamus. But here nothing appears to shew that Dr. *Highmore* has any legal right to what he claims, more than any other of his majesty's subjects: therefore, however sorry we may feel for the disappointment of the individual who has consumed his time and substance in a fruitless pursuit, we cannot interfere.

Dr. *Highmore* himself, who was present in court, then pressed, as reasons for having a rule to shew cause, the hardship of his case, and that this was the only course open to him for having the question of his eligibility discussed. But

LORD ELLENBOROUGH C. J. said, in answer to him, that the Court, since the last term, when this matter was first moved, had considered the question very maturely; and are fully satisfied, that it would be to no purpose to grant a rule nisi, as they must necessarily come to the same conclusion; having no authority to administer a legal remedy except to enforce a legal right.

Rule refused,

1807.

—
The KING
against
The Arch-
bishop of
CANTER-
BURY.

[220]

1807.

Tuesday,
Feb. 3d.

The Case of KIRKBY RAVENSWORTH Hospital.

Where the founder of a hospital directed that if, in making up the accounts of the wardens biennially going out of office any doubt should arise which could not be decided by the new wardens, &c. the ordinary should decide it: and also gave to him the appointment of a master, upon the default of other persons to appoint, within certain times; and power to correct or remove the master for certain causes; and also power to sequester the profits of the wardens, &c. in case of the improper subtraction of a certain sum directed to be kept in a chest for special purposes, until the money was replaced; and also gave to the ordinary the power of *interpreting the statutes* in case of any doubt; and the founder also delegated to the dean and chapter of *York* power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity: held that none of the powers so delegated constituted a visitor, so as to exclude the application of the powers granted by the stat. 43 *Eliz.* c. 4.; and consequently that a commission of charitable uses issued out of the Court of Chancery under that act was valid.

BY an order of the Lord Chancellor, made upon a motion to quash a commission of charitable uses, as having improperly issued in a case not warranted by the statute, the following case was stated for the opinion of this Court. By letters patent under the great seal, in the 2 & 3 *Philip & Mary*, licence was given to *Dr. John Dakyn*, Rector of *Kirkby Ravensworth* parish, in the county of *York*, to found in that parish a school or alms-house, or hospital for the education of boys, and for the relief of the poor; to consist of two wardens and one master of the scholars, and certain other poor persons, according to the statutes, ordinances, and foundation, to be made by the said *John Dakyn*, his heirs or assigns. It was also granted that *Dr. Dakyn*, his heirs, executors, and assigns, or any of them, should, from time to time, make ordinances, statutes, and rules for the government of the said scholars and wardens, boys, and infirm people of the hospital; and that the two wardens and master, and their successors, should be a corporation, and have perpetual succession, by the name of "Wardens, Teacher or Master of the Scholars and Poor People of the Alms-house or Hospital of *St. John the Baptist*, of *Kirkby Ravensworth*," and should be capable of taking lands, &c. *Dr. Dakyn*, by virtue of this licence, in 1556 established the school or hospital, and endowed it with lands, &c.; and also made rules, ordinances, and statutes for the government * of the charity, dated the 11th of *May* 1556; whereby, after appointing a mode of electing the wardens biennially, by ballot, at a meeting of the rector, vicar, or curate of *Kirkby Ravensworth*, and specifying the duties of the wardens; it is provided by cap. 5.

*[222]

that

1807.

—
The Case of
KIRKBY
RAVENS-
WORTH
Hospital.

that both the wardens, after their accompt of their receipts and expences, according to the form prescribed in their oath, (at the giving in of which accounts no parishioner of *Kirkby Ravensworth* is to be excluded) shall receive 10s. for each year of their office by the hands of the new wardens, besides their necessary expences. But if in making up the accounts any doubt or any other thing hurtful to the said alms-house or hospital shall arise, which cannot be decided and ended by the care and discretion of the two wardens, rector, vicar, or curate, and schoolmaster, then the new wardens shall, within 40 days next ensuing, lay this matter before *the ordinary of the place*, and shall take care that the old wardens shall answer before the said ordinary concerning their doings, juxta formulam ecclesiæ, quia contingit de religione domi. By cap. 6. after appointing the election of schoolmaster by the two wardens and the rector, vicar, or curate, and two churchwardens of the parish, or the major part of them, it is provided that if they neglect to substitute a master within 60 days after the death, privation, or promotion of the former master, then the substitution of the said master (if made within 30 days after notice to them) shall pertain to *the dean and chapter of York*; and if they omit, &c. the appointment, for that turn only, shall devolve to *the Bishop of Chester*, or if the see be vacant, to the dean and chapter. By cap. 11. if the master be addicted to gaming or drinking, or be disgraced, or defamed by any other crime that shall stand in need of ecclesiastical correction, this shall be punished by *the ordinary of the place*, according to the rules and canons of the ecclesiastical law; by whom also, if the crime require it he shall be removed from this office. By cap. 31, after ordaining that 5*l.* for the use of the alms-house be constantly kept in a chest in the parish church, and lent only upon good security, for repayment within six months, it is provided that if the money be taken out by rapine, &c. the wardens and schoolmaster shall so long be deprived of their salaries *by the ordinary of the place*, till the money be restored; and in such a case, there shall be a power *in the ordinary* to sequester the profits and make inquiry concerning the premises, when he pleases. Cap. 35. Also I will, ordain, and appoint, that if any doubt shall arise concerning the meaning of the statutes already published, or shall hereafter be set forth by me, or any thereto lawfully authorized;

[223]

1807.

—
The Case of
KIRKBY
RAVENS-
WORTH
Hospital.

[224]

authorized ; that doubt, of whatsoever nature, shall be interpreted, altered, or made new by me *John Dakyn*, if I please to have it so, while I live : but if any doubt shall happen when I am dead, I will that it be determined and interpreted *by the ordinary of the place*, with as much regard to the grammatical sense as may be. Cap. 36. Also if it should happen at any time hereafter that the wardens, schoolmaster, or poor people of the alms-house or hospital, or any of them, shall sell, mortgage, or any other way alienate any of the lands, &c. pertaining to it, otherwise than by leasing the same for years, for the value of the wonted rent at least, or shall permit any of the lands or other premises to be unjustly usurped, and shall not resist the usurpers, &c. to the utmost of their power ; and if after such an attempt the master, wardens, and poor people do not bring an action at law against the usurpers within half a year, and effectually prosecute it ; in such a case I will, ordain, and appoint that the *dean and chapter of York* shall have power and authority to expel and remove, as they like, the two wardens and schoolmaster, or any of them, alienating or consenting to the alienation of the premises, &c. and to appoint others, &c. who will claim and regain the lands usurped, &c. and apply and restore the same to the said alms-house or hospital, and reform the neglects, &c. and preserve the said alms-house or hospital in its primitive state and condition as much as in their power, answerable to the statutes and ordinances of me *John Dakyn*, and of all and every the benefactors of this alms-house. And I further ordain, that the said dean and chapter shall have 30s. yearly for their concern of the premises, viz. 10s. out of the stipend of the two wardens, and 20s. out of the master's salary. until the alms-house or hospital be restored to its pristine state and condition : to cease when this shall be effected, &c. The statutes also contain various directions respecting the schoolmaster, his election, stipend, and oath ; particularly his duties, and for what causes he may be ipso facto deprived of his office, and another elected in his stead : also directions respecting the appointment of the usher, his duty, salary, and office ; the punishment and exercises of the scholars ; the election of the poor people, their oath, behaviour, salary, lodging, duties, and removal : also concerning the lands, rents, revenues, property and accounts of the corporation, and of the repairs of
their

their school-houses, chambers, and buildings. The case also referred to the statutes themselves, if necessary. The question was, Whether there were a visitor, governor, or overseer, or visitors, &c. of the said hospital,* appointed within the meaning of the stat. 43 *Eliz. c. 4.* for redressing the misemployment of lands, &c. given to charitable uses?

1807.

The case of
KIRKBY
RAVENS-
WORTH
Hospital.
*[225]

Scarlett argued (a) against the commission of charitable uses. The question is, Whether there be any general visitor appointed by the founder: if there be, the statute of *Elizabeth* does not apply. Now here a power is given to the ordinary of the place, the Bishop of *Chester*, to interpret the statutes; which confers a general visitatorial authority: and it is no derogation of this authority that an ultimate appeal lies to the same person, in case of any doubt in making up the accounts of the old wardens; or that he has the ultimate appointment of the school master, if the wardens, &c. neglect to fill up the vacancy within 60 days in the first instance, and the Dean and Chapter of *York* within 30 days after notice in the second instance; or that to him is before expressly given the correction and deprivation of the master for sufficient cause; and the sequestration of the profits of the wardens and schoolmaster, until the money improperly subtracted from the chest be restored. The dean and chapter of *York* have indeed a special power delegated to them to remove the warden and schoolmaster consenting to a mortgage or alienation of any of the estates of the charity: but there is nothing inconsistent in the appointment of a special visitor for a special purpose; while for general purposes a general visitor is appointed. The power of interpreting the statutes of the foundation, without appeal or control, is the most general visitatorial power which can be delegated. No technical form of words is necessary to appoint a visitor; it is sufficient if such be collected to have been the intention of the founder. He cited at large *The Attorney-General v. Talbot* (b) and *St. John's College v. Todington* (c).

[226]

(a) I was not present in court when the case was argued; but was furnished with the notes of some of the gentlemen, who were engaged in the cause; from whence the arguments have been selected.

(b) 3 *Atk.* 662, 7.

(c) 1 *Burr.* 158. 201. &c. and 1 *Blac.* 71 to 90.

Holroyd

1807.

The Case of
KIRKBY
RAVENS-
WORTH
Hospital.

Holroyd contra. No general visitor is appointed within the meaning of the statute of *Elizabeth*; but the ordinary has only a special authority delegated to him in particular cases, as the dean and chapter have in others. There is no case where a power of interpreting the statutes of the founder has alone been deemed to constitute the interpreter a general visitor. In the case of *The Attorney-General v. Talbot*, Lord *Hardwicke* certainly looked to other clauses than that giving the power of interpretation. He referred to another clause, "Cancellarius, &c. poterit visitare; et si quid inter eas repererit corrigendum, &c. corrigat et puniat." Next the foundress directed who should construe the statutes, viz. the chancellor with his assistants, and she *excluded her own heirs*. The cases, therefore, do not bear out the position that a power to interpret the statutes constitutes a visitor; for in both there was an express power given to visit, and to correct and punish. The statute of *Elizabeth* (a) looked particularly to correct abuses which had been committed in respect of lands given to charitable uses. Here there is no general power given to correct such abuses, but a special power only, which excludes the other. If the founder had meant that the ordinary should have general power over the funds, he would not have given him a special power in the instance of the 5*l.* improperly withdrawn from the chest. It has been holden that a general visitor may expel: but a power to interpret statutes cannot include a power either of expulsion or appointment. And in construing the statutes of the founder, nothing is to be taken away from him or his heirs, who are the proper visitors, except by plain words or necessary implication. If a general visitor had been appointed, or even a general power of control given over all the lands, &c. of the charity, no commission could issue under the statute of *Elizabeth*: but the power is only given to the dean and chapter of *York* in the particular cases of mortgage or alienation by the wardens, &c. who have the immediate management: there is no provision made against abuses of a different description, or by the dean and chapter themselves.

The following certificate was afterwards sent to the Lord Chancellor:

(a) 43 *Eliz. c. 4.*

We have heard this case argued, have considered it, and are of opinion, that there is not any visitor, governor, or overseer, or visitors, governors, or overseers of the said hospital *appointed*, within the intent and meaning of the act of parliament made in the 43d of *Elizabeth*, c. 4. above referred to; so as to exclude the application of the powers granted by that act.

12th Feb. 1807.

ELLENBOROUGH.

N. GROSE.

S. LAWRENCE.

S. LE BLANC.

1807.

The case of
KIRKBY
RAVENS-
WORTH
Hospital.

DOE, on the Demise of the Earl of CARLISLE *against*
WOODMAN and FORSTER.

[228]
Wednesday,
Feb. 4th.

THE Earl of *Carlisle* brought this ejectment to recover certain pasture lands in *Morpeth* and *Mitford*, in the county of *Northumberland*, which had for many years before been demised by him to the corporation of *Morpeth* as tenants from year to year at an annual rent. And at the trial before *Graham B.* at *Newcastle*, proof was given of a notice to quit on the 12th of *May* 1806, which was served on the 7th of *October* preceding upon the defendants, who were the two bailiffs or head officers of the corporation. It also appeared that the two bailiffs were annually elected on the first *Monday* after *Michaelmas*; that the rent which was due on the 12th of *May* had constantly been received from "the bailiffs" for the time being, and was so expressed to be in the steward's receipts, given to them; that cattle had been used to be turned upon the lands in question, but to whom belonging did not appear; (though it was now suggested that the privilege of turning on cattle had been enjoyed by such of the corporators at large as chose to avail themselves of it;) and that the present bailiffs, the defendants, had been chosen recently before they were served with the no-

An ejectment against the bailiffs pro tempore of a corporation, cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession

is merely evidence of a tenancy in the corporation. But at any rate such tenancy may be determined by a notice to the corporation to quit, served on its officers: after which the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises.

tice

1807.

—
DOE
against
WOODMAN.

[229]

rice to quit, and had not hitherto paid any rent. Thereupon the defendant's counsel pressed for a nonsuit; insisting that the ejectment ought to have been brought against the corporation, who were the lessees, and not against the bailiffs, who were the mere stewards of the corporation, and as such had paid rent; and that there was no evidence of possession by these defendants in their individual capacity. In answer to which it was contended, that the ejectment proceeded on the ground that the corporation were the tenants of Lord *Carlisle*, but that they occupied the land by the bailiffs as their principal officers. That the corporate body could not be made defendants, not being in the actual occupation of the land: and that the receipts for rent were evidence that the bailiffs *virtute officii* had the actual possession. And the learned Judge, inclining to the latter opinion, suffered a verdict to be taken for the plaintiff, with leave to the defendants to move to enter a nonsuit. A rule nisi was accordingly obtained for this purpose in the last term; against which

Park, Wood, and Carr, now shewed cause, and rested principally on the difficulties which the lessor of the plaintiff had to encounter in this case; inasmuch as the corporation, quâ corporation could not have an actual possession, or commit trespass (a), and having no visible being, could not be served with a notice to quit: it would be impossible to serve every individual corporator. Their occupation could only be by their officers or tenants, and these only could be served with notice to quit, as had been done in the present case: and the receipts shewed that the bailiffs *pro tempore* were the actual occupiers in regular succession, one set after another. Besides, the bailiffs, by coming in to defend, admit themselves to be in possession as tenants.

[230]

Cockell Serjt. Holroyd, and Richardson, *contrà*, were stopped by the Court.

LORD ELLENBOROUGH C. J. The bailiffs, *as such*, not being a distinct corporation, cannot have the possession: whatever

(a) *Bro. Corporation*, pl. 43. Sed Vide *Com. Dig. Franchise*, F. 19. and *Th. Dig. lib. 4. c. 13. s. 3. 4. 7.* and *Hil. 45 Ed. 3. 2. M. 8 H. 6. 1. M. 9 H. 6. 36. M. 20 H. 6. 9. M. 15 Ed. 4. 2. T. 4. H. 7. 13. and M. 32 H. 6. 10.*

they enjoy, as bailiffs, must be in right of the corporation at large. There is no evidence at all to affect these defendants; for the bailiffs are no corporation of themselves, and therefore can have no succession; and consequently cannot, as bailiffs, be affected by the receipts for rent given to their predecessors. There is no privity in law between them.

1807.

DOE
against
WOODMAN.

LAWRENCE J. Though trespass cannot be maintained against a corporation as such; yet the lessor is not without remedy: for at any rate the tenancy may be determined by notice to the corporation, served on its officers. And if after such determination the cattle of any person be found upon the premises, they may be distrained as trespassing upon the Earl of *Carlisle's* ground: or Lord *Carlisle* might have turned his own cattle in (a): or ejectment might be brought against any person being tenant in possession under the corporation.

LE BLANC J. These defendants have never paid any rent for this ground; and not being a corporation in themselves they cannot be affected by what former bailiffs have done; though it is rather evidence that they paid the rent on behalf of the corporation. And when the tenancy is determined, the lessor will have his remedy against any person in possession, or whose cattle shall be found trespassing on his land.

Lord ELLENBOROUGH C. J. added, that there was no great difficulty in the lessor's asserting his right; but at any rate he had mistaken his way in adopting this mode of doing it.

[231]

GROSE J. absent.

Rule absolute.

(a) Vide *Taunton v. Foster*, 7 Term Rep. 431.

1807.

Friday,
Feb. 6th.Sir ROGER KERRISON Knt. *against* COLE and Others,
Executors, &c. of JOHN MANN.

Though a bill of sale for transferring the property in a ship by way of mortgage may be void, as such, for want of reciting the certificate of registry therein, as required by stat. 26 G. 3. c. 60. s. 17. yet the mortgagor may be sued upon his personal covenant contained in the same instrument for the repayment of the money lent.

*[232]

THE plaintiff declared in covenant upon an indenture, made the 31st of May 1793, between himself and the testator, whereby in consideration of 2500*l.* advanced by the plaintiff to the testator, and for securing the repayment of it, the testator bargained and sold to the plaintiff the ship *Triton*, of *Yarmouth*, then trading to *Newcastle*; the ship *Hope*, of *Ely*, then trading to *Dantzick*; the ship *Albicore* of *London*, then trading to *London*; the sloop *Squirell*, of *London*, then trading to *London*; a moiety of the brig *Friends*, of *London*, (describing all these vessels by their tonnage, &c); and also three certain lighters, (describing them,) with a proviso for the indenture to be void upon payment by the testator, his executors, &c. of 2500*l.* to the plaintiff on the 31st of August ensuing the date. The indenture also contained an express covenant by the testator, for himself, his executors, &c. to pay to the plaintiff the said 2500*l.* with interest, &c. The declaration concluded with alleging a breach by non-payment of the money. The plea, after craving over of the indenture, which was set forth in substance as in the declaration stated; with covenants for * the title of the testator, and for the quiet enjoyment of the plaintiff, and for further assurance; pleaded, that the plaintiff and the testator, at the time of making the indenture, were subjects of the king, and that the ships and lighters mentioned had been registered pursuant to the stat. 26 Geo. 3. c. 60., and that certificates of registry of each of them had been granted pursuant to the act. That the property of the said ships and lighters so intended to be transferred was then in the testator, and that *the certificates of registry of the same were not recited in the said indenture, as required by the statute; wherefore the said indenture was utterly null and void to all intents and purposes.* To this there was a general demurrer, and joinder.

Manley, in support of the demurrer, contended that the defendants were liable upon the covenant of their testator for the repayment of the money, although the security were void, as to the vessels intended to be mortgaged, for the defect pointed out.

For

1807:

 KERRISON
 against
 COLE.

For the stat. 26 G. 3. c. 60. s. 17., on which the objection arises, only avoids the instrument, *quà* bill of *sale*, and not the collateral personal covenant of the party. The 3d section directs every *British* ship to be registered, and a certificate thereof to be obtained. The 16th section provides that, in case of any alteration in the property of the ship, the same shall be indorsed upon the certificate of registry. And the 17th section requires that upon any transfer of the property such certificate shall be recited “in the bill or other instrument of sale thereof;” “and that otherwise such bill of *sale* shall be utterly null and void to all intents and purposes.” The object of the act being to confine the privileges of *British* ships to *British* subjects will be effectually secured by avoiding the transfer for want of the proper requisites, without extending the avoidance to every collateral contract contained in the same instrument. As in *Mouys v. Leake* (a), where a rector, having granted an annuity out of his benefice, which was void by the stat. 13 *Eliz.* c. 20., was yet holden to be liable upon his personal covenant to pay it contained in the same deed: though the statute says that “all chargings of benefices with any pension out of the same, &c. shall be *utterly void*.” Lord *Kenyon* said that a deed intended to operate in one way may operate another way, *ut res magis valeat quam pereat*, if honesty require it: and that the deed, which was intended to operate as a rent-charge upon the living, might have effect as a personal security against the grantor, containing, as it did, a covenant to pay the annuity. And in *Mestaer v. Gillispie* (b), Lord Chancellor *Eldon* seemed inclined to adopt the same construction upon the registry act.

Wood, *contra*, insisted that the whole instrument was void, both by the policy and the words of the registry act. The words are, that “the bill or other instrument of sale shall be *utterly null and void* to ALL intents and purposes,” if the certificate of registry be not truly recited therein: not merely that the *property* shall not pass. But this is an attempt to make the instrument good to *one* intent and purpose, though void as to all others; which will counteract the object and policy of the law nearly as much as if it were valid to *all* intents. When the act says that the instrument of sale shall be void, it is the same as if it

[233]

(a) 8 *Term Rep.* 411.(b) 11 *Ves.* 629.

1807.

KERRISON
against
COLE.

said that every part and clause of it shall be void. The omission may be made with intent to evade the law, taking the chance of reverting to the personal security of the party, if the objection be made. At any rate the parties who omit to do that which the policy of the law requires to be done for purposes of state, are in delicto, and ought not to be aided in any respect against the letter of the law. The stat. 34 *Geo. 3. c. 68. s. 14.*, in *pari materia*, reciting the 17th section of the former act, and that doubts had arisen whether contracts for the transfer of such property might be made without any instrument in writing, provides that no such contract shall be valid to any purpose whatsoever, either in law or in equity, unless made by *bill of sale* or *instrument in writing*, containing the recital required by the former act: which shews that the Legislature meant to avoid the instrument itself in toto in case of omitting the requisite formalities. The bill of sale also contains several other covenants besides that for repayment of the money, which relate to the ships; and it will be difficult to sever the one from the other. [Lord *Ellenborough C. J.* All dependant covenants must share the fate of the principal covenant, on which they depend.] They are all interwoven, and form one entire contract in one instrument. And no injustice will be done in the particular case; for the plaintiff may still sue as a simple contract creditor for the money lent. He admitted that the case of *Mouys v. Leake*, which he was not before apprised of, bore strongly on the present: but questioned its consistency with the policy of the registry acts.

[235]

LORD ELLENBOROUGH C J. The case of *Mouys v. Leake* is founded on admirable good sense and sound law. This is an attempt to put a harsher construction on these acts than has ever yet been done, and cases sufficiently hard have already occurred; though altogether the acts are very beneficial to the public. This was an assignment, by way of mortgage, of certain ships, which by the direction of the acts must have certificates of registry; and in order to make the assignment effectual as *sales* of these ships, it is necessary that it should contain recitals of the certificates, according to the direction of the 17th section of the 26 *Geo. 3. c. 60.*, which says, "that when *the property* in any ship belonging to any of his majesty's subjects shall be transferred to any other subject in whole or in part, the

1807.

 KERRISON
 against
 COLE.

the certificate, &c. shall be truly recited, &c. in the bill or other instrument of sale; and this must be done on pain of vacating the security. But what security does it vacate? The *bill of sale*: the clause goes on, "otherwise such bill of *sale* shall be utterly null and void to all intents and purposes." It does not vacate the whole instrument which may happen also to contain any other independent contract between the parties; but that part of it only which operates as a bill of *sale*. Nor was it necessary to do more: and therefore the words of the stat. 34 *Geo.* 3. c. 60. s. 14. are, that no *transfer, contract, or agreement for transfer* of property in any ship shall be valid, unless it be in writing, containing the recital prescribed by the former act. And thus far it was necessary to go to give effect to the acts. But to go farther, and vacate the covenant for payment of the money lent, would be going beyond the reason and object of the Legislature in order to work injustice. If we wanted any case to warrant this construction, it is supplied by that which has been cited; where the question arising upon the stat. 13 *Eliz.* c. 20. containing words of avoidance equally strong with the registry act; the Court held that it did not affect the personal covenant to pay the rent-charge, but only defeated the security of such rent-charge upon the living.

[236]

LAWRENCE J. (a). The object of the act will be very sufficiently answered if we hold it to make void so much only of the instrument as is meant to convey the property in the ships. The object of the Legislature was that it should be made appear who were the real owners of *British* ships, in order to prevent any transfer of them to foreigners, who might navigate them under the privileges of the *British* flag. That will effectually be done by saying that the transfer shall be void if the requisites be not complied with; without avoiding a collateral covenant for the payment of money contained in the same deed by which the ships were intended to be mortgaged. And this construction is according to the rule of the common law, as laid down by *Hutton J.* in *Ley's Rep.* 79. that when a good thing and a void thing are put together in the same grant, the common law makes such a construction that the grant shall be good for that which is good, and void for that which is void. There is in-

(a) *Grose J.* was absent from indisposition.

1807.

—
KERRISON
against
COLE.

[237]

deed a distinction taken in *Hob. Rep.* 14. between an avoidance of an instrument by the common, or by the statute law; that if it be void in part by the statute law, it is void for the whole; but that the common law only avoids so much of it as is bad, leaving the rest which is good; which distinction was alluded to by Lord C. J. *Wilmot* in *Collins v. Blantern* (a). But these cases, when examined, are easily reconcilable; as in the case of sheriffs' bonds, which are only authorized to be taken with a certain condition; and therefore if they be taken with any other condition, they are void in toto, and cannot stand good in part only: but that does not apply to different and independent covenants in the same instrument, which may be good in part, and bad in part. The case therefore of *Mouys v. Leake* agrees with all the authorities, and governs the present case.

LE BLANC J. Our opinion on the construction of the registry act is fully supported by the case cited: but even without that I should have had no doubt upon the subject. For the object of the act, which was to enforce a mere political regulation, is effectually attained by avoiding the transfer of the ships, for want of the requisites in the bill of sale: and there being nothing immoral in the transaction itself, there is no necessity for carrying the construction further. When, therefore, the act says that for want of certain requisites such "bill of sale" shall be void, it means only that such *transfer of the property* shall be void.

Judgment for the Plaintiff.

(a) 2 Wils. 351.

Saturday,
Feb. 7th.

In the Matter of SAMUEL LOWE.

The Court will not compel an attorney upon a summary application to deliver up, on

payment of his demand, a lease put into his hands for the purpose of making an assignment of it, there being no cause in court, nor any criminal conduct imputed to him in respect of it.

COWLEY moved for a rule upon Mr. *Lowe*, an attorney of this court, to shew cause why he should not deliver to *Williams* and others, members of a building society, a lease which they had put into his hands in order to prepare an assign-

ment

ment of it; having offered to pay him what he claimed for his bill. Upon a question put by the Court, Whether there were any cause in court, he admitted that there was none; but cited *Hughes v. Mayre*, (a), and *Strong v. Howe* (b), to shew that the Court, without any cause pending, would compel an attorney, by rule, to deliver up papers entrusted to his charge by his clients, upon paying what was due to him in his character of attorney.

1807.

In the Matter
of
SAM. LOWE.

The Court, however, referred to *Cocks v. Harman* (c), as having recently settled the point, that they would not interfere in this summary mode to compel an attorney to deliver up papers; which, if improperly detained, were the subject matter of a bill in equity, or of an action; as the rule was laid down in *Goring v. Bishop* (d). Here the deed was not put into *Lowe's* hands for the purpose of any cause in Court; nor was there any imputation against him of criminal conduct in his character of attorney. And they distinguished this from the case of *Hughes v. Mayre*, where the principal object of the application was to compel the attorney to deliver up the court rolls of a manor, of which he acted as steward, to the lord.

Rule refused.

(a) 3 *Term Rep.* 275.
(c) 6 *East*, 401.

(b) 1 *Str.* 621.
(d) *Salk.* 87.

DUNSTER against DAY and SMITH.

[239]
Saturday,
Feb. 7th.

AFTER judgment by default, and a writ of inquiry executed, and damages assessed at 4*l.* 7*s.* 6*d.*, the defendant *Day*, before final judgment, obtained a rule nisi for entering a suggestion on the roll that the defendants resided, &c. at the time of the commencement of this action, within the jurisdiction of the *London Court of Requests*, (under stat. 39 & 40 *Geo.* 3.

The *London Court of Requests* act 39 & 40 *G.* 3. c. 104. s. 12. provides that if any action be commenced out of that court

for any debt not exceeding 5*l.* (within the jurisdiction) the plaintiff shall not, by reason of a verdict for him, or otherwise be entitled to costs, &c. Held that after judgment by default, and the damages assessed upon a writ of inquiry, the defendant might come into court and move to stay proceedings on payment of the damages assessed, without costs.

1807.

DUNSTER
against
DAY and
SMITH.

c. 104. (a), giving jurisdiction to the extent of 5*l.*;) and why upon payment of 4*l.* 7*s.* 6*d.*, the damages assessed upon the writ of inquiry, &c. without costs, the proceedings should not be stayed.

Wigley objected, on shewing cause, that the application was too late after interlocutory judgment; and cited *Brampton v. Crabb* (b), where a similar motion upon the stat. 3*J.* 1. c. 15., for regulating the same court, was denied; because the defendant, having made default, was out of court to all purposes but having judgment against him, and therefore could not be received to make the suggestion. And here, the *verdict* spoken of in the 12th section of the late act means a verdict obtained before a *Judge*, as appears by the latter part of the clause.

[240]

Barrow, in support of the rule, said that the case cited had been since over-ruled in *Barney v. Tubb* (c).

LORD ELLENBOROUGH C. J. The 12th section of the stat. 39 & 40 G. 3. says, that if the action be commenced out of the Court of Requests for any debt not exceeding 5*l.*, the plaintiff shall not, by reason of a *verdict* for him, or otherwise, be entitled to costs; which must include the present case. And there is nothing to prevent the defendant, when he is out of court, from coming here, on motion, to shew that he is within the protection of the act.

The Court accordingly (absente *Grose J.*) made the latter part of the rule absolute for staying the proceedings, on payment of the damages assessed, without costs.

(a) The 12th section enacts, “ that if any action shall be commenced in any other court than the said Court of Requests for any debt not exceeding 5*l.* &c. the plaintiff shall not, by reason of a verdict for him, or otherwise, have or be entitled to any costs whatsoever. And if the verdict shall be given for the defendant, and the Judge, before whom the action shall be tried, shall certify, &c. then the defendant shall have double costs,” &c.

(b) 1 *Stra.* 46.

(c) 2 *H. Blac.* 356.

1807.

DELL *against* WILD.Saturday,
Feb. 7th.

THE plaintiff in the action having obtained judgment in debt upon a recognizance of bail, *Scarlett* moved for leave to sue out execution, notwithstanding a writ of error brought upon the judgment; the plaintiff in error not having put in bail. The stat. 3 *Jac.* 1. c. 8. provides that no execution shall be stayed by writ of error for reversing any judgment upon any obligation conditioned for the payment of money only, or upon any contract, &c. unless the plaintiff in error enter into a recognizance with sureties to prosecute the writ of error with effect, and to pay the debt, &c. if judgment be affirmed. And he argued, that if the recognizance of bail were not an obligation conditioned for the payment of money only, at least it was a contract, and as such within the act. And in *Trinder v. Watson* (a), upon a similar motion, founded upon a judgment in debt upon a recognizance in error, Lord *Mansfield* thought that the statute, being a remedial law, ought to be liberally construed; though ultimately the point was not decided.

Lord ELLENBOROUGH C. J. The word *contract* is used in the statute in contradistinction to *obligation*, under which this must be classed, if at all. But here the recognizance is in the alternative, to pay the money, or render the body; whereas the statute applies to obligations for the payment of money only. And the practice has accorded with this interpretation.

Per Curiam.

Rule refused.

A writ of error upon a judgment in debt on a recognizance of bail is a stay of execution; not being within the exception of the stat. 3 *J.* 1. c. 8. either as a judgment upon an obligation conditioned for payment of money only (the recognizance being to pay money or do something else;) or as a judgment upon a contract, which is there used in contradistinction to an obligation.

*[241]

(a) 3 *Burr.* 1566.

1807.

*Monday,
Feb. 9th.*WARRINGTON and Another *against* FURBOR and
WARRINGTON.

A guarantie in writing, for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception of the stampact, "a contract for or relating to the sale of goods," and need not be stamped.

The vendee having accepted a bill of exchange for the price of the goods, and becoming bankrupt before the bill became due, the guarantee who paid the vendor after the bankruptcy of the vendee may recover back the money from the

latter, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; and the notorious insolvency of the vendee acceptor being at least a *prima facie* warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill: however, it might still be competent for the vendee to defend himself against this action by the guarantee, by shewing that if a demand for payment had been made upon him by the holder, the bill would have been paid.

*[243]

THIS was an action for money lent and advanced, and money paid to the use of the defendants, the latter of whom suffered judgment by default, and the other went to trial before Lord *Ellenborough* C. J. in *London*; where it appeared that in *May* 1801 the defendant applied to one *Martin* to purchase of him *Manchester* goods to the amount of 1079*l.* and proposed the guarantie of the plaintiffs; who, on *Martin's* application, afterwards gave him the following guarantie in writing, unstamped: "*Southwark, May 9th, 1801. Mr. Thomas Martin—* at the request of Messrs. *Furbor* and *Warrington*, who inform us that they are about purchasing goods of you to the amount of 1000*l.*, we hereby guaranty the payment of that sum, if purchases are made—say, at a credit of six months. Yours, &c." (Signed by the plaintiffs.) The goods were accordingly furnished, and a bill drawn for the value, on the 30th of *May*, by *Martin* upon the defendants, at six months' date, and accepted by them. This became due on the 3d of *December*; but on the 21st of *November* preceding the defendants became bankrupts, and a commission issued against them: in consequence of which the plaintiffs were obliged to pay *Martin* 1000*l.* on their guarantie after the bankruptcy of the defendants, and brought this action to be reimbursed. The defendant *Furbor* made two objections at * the trial; 1st, that the guarantie in writing ought to have been stamped before it could be received in evidence: 2dly, that the bill was not proved to have been presented for payment to the bankrupt,

acceptors,

1807.

WARRING-
TON
against
FURBOR.

acceptors, when it became due : without which, it was insisted, that *Martin* could not have recovered against the plaintiffs on their guarantie ; who had therefore paid him the money in their own wrong. To the 1st, the case of *Curry v. Edensor* (a) was relied on as an answer ; where a broker, upon the purchase of goods for his principal, having agreed in writing to indemnify him from loss on the resale ; it was holden to be within the exception of the stamp act 23 *Geo. 3. c. 58* (b), s. 4. as being a *contract relating to the sale of goods*. But upon a doubt whether this case were not distinguishable from that, as being an agreement relating to a *future* and not a *present* sale of goods, this point was reserved. As to the 2d, Lord *Ellenborough* was of opinion that this, not being an action upon the bill, but for reimbursement of the money paid upon a collateral guarantie of the solvency of the acceptors, to whom the goods were furnished, strict proof of the presentation of the bill was not necessary, where it was obvious that it could have been of no avail, the acceptors having been then recently stripped of all their property. A verdict was therefore taken for the plaintiffs ; which was moved on a former day to be set aside, and a verdict to be entered for the defendant, on the first ground of objection, or a new trial granted on the second.

Garrow and *Espinasse* now shewed cause against the rule for this purpose ; and relied in answer to the first objection, upon the case of *Curry v. Edensor* ; and upon the particular wording of the stamp acts, which did not merely exempt “ contracts for the sale of goods,” but “ for or relating to the sale of any goods ;” and the Court, in that case, considered the exemption as extending to contracts of *indemnity*. As to the second objection, they relied upon the answer given to it at the trial.

[244]

Sir *V. Gibbs*, in support of the rule, endeavoured to distinguish this from *Curry v. Edensor*, which turned on an agreement for the *present* sale of certain goods ; and therefore properly a contract relating to the *sale* of such goods ; which was relied on by Lord *Kenyon* and *Buller J.* in giving their opinions. But this was no present *sale* of goods ; for none were specified ; but a guarantie to take effect upon any *future* sale, of any

(a) 3 *Term Rep.* 524.

(b) The duty is enlarged by the subsequent acts 35 *Geo. 3. c. 30.* and 37 *Geo. 3. c. 90.* but the exceptions are the same.

1807.

WARRING-
TON
against
FURBOR.

goods, at any time, within a certain amount. On the second point he urged that it was material to the defendants to stand as debtors to *Martin* on the bill, whose debt must be proved under the commission, rather than to the plaintiffs, to whom they were personally liable if at all. And as there was a possibility that they might have been able, by the assistance of friends, to have paid the bill, if presented to them for payment when due, and proof of such presentation must have been made by an indorsee before he could recover against a drawer; so the plaintiffs, who, as guarantees, stand in the same situation as an indorsee, ought to be held to the same proof. And they cannot *voluntarily* take upon themselves to pay the debt of the defendants to *Martin*, without *Martin* having used due diligence to get payment from the defendants; because it alters the situation of the latter.

[245]

LORD ELLENBOROUGH C. J. Two points have been made; 1st, whether this be "a contract for or *relating to* the sale of any goods," within the exception of the stamp acts? And I think that where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out; and we should give a liberal construction to words of exception, confining the operation of the duty. The only doubt I had at the trial arose upon reading the words of Lord *Kenyon* in the report of *Curry v. Edensor*, where he seems to lay stress on the agreement having been made *at the time* of the original contract of sale, and relating to the sale of the particular goods; which does not apply to the agreement in question: but giving a fair and liberal sense to the words of the exception, this agreement did *relate to the sale of goods*, though not of any *particular* goods in contemplation at the time, and therefore did not require to be stamped. This seems to be the safer construction of the acts. As to the second point, the same strictness of proof is not necessary to charge the guarantees as would have been necessary to support an action upon the bill itself, where by the law-merchant a demand upon and refusal by the acceptors must have been proved in order to charge any other party upon the bill; and this notwithstanding the bankruptcy of the acceptors, as was recognized in the argument of *Russel v. Langstaffe* (a). But this is not necessary to charge guarantees,

(a) *Dougl.* 515.

who insure as it were the solvency of their principals; and therefore if the latter become bankrupt and notoriously insolvent, it is the same as if they were dead; and it is nugatory to go through the ceremony* of making a demand upon them. The plaintiffs might fairly have said to *Martin*, that the acceptors being insolvent, and their effects being assigned for the benefit of their creditors, they (the plaintiffs) would not put him to the proof of a demand upon the acceptors, which must have been fruitless, but would pay the money at once, and look to their remedy over.

GROSE J. declared himself of the same opinion; and said that the necessity of a demand, notwithstanding the bankruptcy of the acceptor in order to charge the drawer or indorser of a bill, was founded solely upon the custom of merchants.

LAWRENCE J. upon the first point, said, that the words of the stamp act were general, and there was nothing to limit them to an immediate sale of goods as between vendor and vendee: on the contrary, the observation made at the bar was material, that the exception extended not only to contracts *for* the sale of goods, but also to such as *related* to the sale of goods: and this construction seemed best calculated to give effect to the words of the legislature. On the other point, he added afterwards, that though proof of a demand on the acceptors, who had become bankrupts, were not necessary to charge the guarantees, yet that the latter were not prevented from shewing that they ought not to have been called upon at all; for that the principal debtors could have paid the bill if demanded of them.

LE BLANC J. In construing this revenue law we cannot give effect to the objection as to the want of a stamp, without saying that the words *for* the sale or *relating* to the sale of goods must necessarily mean the same thing; but parties might make a contract *for* the sale and *relating* to the sale of the same goods by different instruments, with different objects. As to the other point, there is no need of the same proof to charge a guarantee as to charge a party whose name is upon a bill of exchange; for it is sufficient as against the former to shew that the holder of the bill could not have obtained the money by making a demand upon the bill.

1807.

WARRING-
TON
against
FURBOR.

*[246]

[247]

Rule discharged.

1807.

Saturday,
Feb. 7th.

KEENE, on the several Demise of GEORGE Lord BYRON and Others, against DEARDON and Others.

A., tenant for life, remainder to his son *B.* in tail, reversion to himself in fee, agreed with *B.*, in order to relieve themselves from their debts, to bar the entail; and in 1773 they conveyed estates in *N.* and *L.* to the use of trustees and their heirs, in trust to sell the *N.* estates and pay the debts, &c.; and as to the *L.* estate (the only one in question,) in trust that the trustees should, with the consent of *A.* and his wife, and *B.*, or the survivor, sell the inheritance in fee, and apply the purchase-money on the trusts after mentioned: with a proviso, that the rents, issues, and profits, should, until sale of the inheritance, be received by such person and for such uses as they would have been if the deed had not been made and no fines levied. And as to the money arising from the sale of *L.* estate, in trust to invest the same, with the like consent, in the purchase of other lands in fee to be settled, subject to certain charges, on *A.* for life, remainder to *B.* in fee. Held,

GEORGE Lord Byron brought this ejectment, claiming as heir at law of *Wm. John Byron*, the grandson, and of *Wm. Byron*, the eldest son of *William* the first Lord *Byron*,

1. That the use of the *L.* estate was immediately executed in the trustees, even before any consent given to the sale of it by *A.* &c.; and that, notwithstanding the proviso, which stipulated only for the receipt, by the party before entitled, of the rents, &c., as contradistinguished from the legal estate of the inheritance, which was left in the trustees. And that this was not a mere power of sale in the trustees tacked to the legal estate of the owner.

2. That though *A.*, who survived his wife and *B.* continued in possession of the *L.* estate down to 1795, when he sold it, and died some time after; and though, after sale of the *N.* estate in 1774, for the payment of the debts, the trustees of the *L.* estate never interfered in further execution of the trust during *A.*'s lifetime, but brought ejectment after his death; yet that no presumption could be made at the trial in favour of the defendants, who purchased from *A.* in 1795, for a valuable consideration, without notice, either that the trustees had re-conveyed the legal estate to *A.* in his lifetime, as upon a satisfied trust, according to the old uses; or had conveyed a new estate to him as a purchaser under a sale by them in execution of their trust. For a court of law will never presume a reconveyance by trustees where such reconveyance would be a breach of their trust; which would be the case here upon a supposition that *B.*, the son, was a purchaser for a valuable consideration of the remainder in fee, which was to be limited to him upon the settlement of the new estate to be acquired with the purchase money of the *L.* estate. Nor is such a presumption to be made in the first instance, even in the case of a doubtful equity, before a court of equity has declared in favour of the equitable title of the party for whom such presumption is required. Nor was there any evidence to support a presumption that *A.* had purchased a new estate of the trustees.

3. That *A.*'s possession and receipt of the rents, issues, and profits of the *L.* estate, though for above 20 years after the creation of the trust without any interference of the trustees, did not shew his possession to be adverse to their title, so as to bar their ejectment against his grantees; such possession and receipt being consistent with and secured to him by the deed of trust.

to recover possession of certain premises and coal-mines in the manor of *Rochdale*, in the county of Lancaster, which the defendants had purchased of the *said fifth Lord *Byron* under a conveyance in 1795. *John Heaton*, another of the lessors of the plaintiff, is the surviving trustee under the deed of the 13th of *November* 1773, after-mentioned, of the estates in question. *Lady Wodehouse*, another of the lessors, is the representative of *Wm. Lord Berkley*, the surviving trustee in the act of parliament of 1747, settling these estates. And the other lessor is the surviving representative of *Cha. Montague*, the surviving trustee of a term of 500 years under the same act. At the trial before *Sutton B.* at *Lancaster*, a copy of the act, together with the deeds of the 12th of *July* and of the 13th of *November* 1773 were proved; under which it was insisted on behalf of the present Lord *Byron*, that his great uncle, *Wm.* the fifth lord, under whom the defendants claimed by purchase, was only tenant for life of the *Rochdale* estate with remainder to his son *Wm. Byron* in fee: and that the same descended to the present lord as heir at law of *Wm. Byron* the son, who died in the lifetime of his father; and that he became entitled to the possession thereof on the death of the late *Wm. Lord Byron* the fifth, in 1798; and that the legal estate was either in him, or in some one or other of the trustees, lessors of the plaintiff. The defendants, on the other hand, who claimed under the conveyance of *Wm. Lord Byron* the fifth, in 1795, contended that the deeds of 1773 were made only for a special purpose, which had been answered; and subject thereto that the *Rochdale* estate was, at the time of the conveyance to them, still under the limitations of the act of parliament, by virtue of which *Wm. Lord Byron* the fifth (the settlor in the deeds of 1773) was seised of the reversion in fee, and in the events that had happened, by which the purposes of those deeds were satisfied, could make a good title to a purchaser: and that with respect to the legal estate in the reversion, either that the use was executed in the late Lord *Byron* the vendor, or that the judge would direct the jury to presume a conveyance to him from the trustees. They also insisted upon an adverse possession against the trustees for above 20 years in bar of the ejectment. The learned judge, however, over-ruled the objection of an adverse possession, and did not instruct the jury to presume a conveyance from the trustees of the legal estate to Lord *Byron* the settlor;

1807.

KEENE
against
DEARDON.
*[249]

[250]

1807.

—
KEENE
against
DEARDON.

settlor; but directed them to find a verdict for the plaintiff, with liberty for the defendants to move to enter a nonsuit, or a verdict for themselves, in case this Court should be of opinion that the lessors of the plaintiff were not entitled to recover: on which a rule to shew cause was afterwards obtained.

The title appeared to stand thus: By a private act of parliament, passed in 1747, for settling the estates of *Wm. Lord Byron* and *Eliz. Shaw*, on their intermarriage, reciting a prior indenture, made on the marriage of the preceding *Lord Byron* with *Frances Berkley*, whereby the *Nottinghamshire* and *Rochdale* estates were limited to the use of the last-mentioned *Lord Byron* for life; remainder to the use of trustees for a term of 700 years, to raise portions for younger children; remainder to the use of the first and other sons of the marriage in tail male; with divers remainders over: and reciting that the last mentioned *Lord Byron* died in 1786, and by his will directed the portions of his younger children to be paid out of his personal estate; and that he left issue the said *Wm. Lord Byron* his eldest son, and three younger sons and a daughter: that *Wm. Lord Byron* had then lately suffered recoveries of the settled estates, and that the inheritance of the premises, subject to the term of 700 years, was vested in him in fee; and reciting an agreement to re-settle the estates upon his then intended marriage; it was thereby enacted that certain estates of his in *Nottinghamshire* and the *Rochdale* estate in *Lancashire* should be vested in *Lord Berkley* and the *Earl of Carlisle* and their heirs, subject to the term of 700 years, to the use of *Wm. Lord Byron* for life; remainder to the trustees to preserve contingent remainders during his life; and after his decease to secure a jointure of 500*l.* a year to *Lady Byron* for her life; and subject thereto, remainder to *Cha. Montague* and others for a term of 500 years, upon trust to secure *Lady Byron's* jointure, and to raise portions for younger children; remainder to the use of the first and other sons of the marriage in tail male; and in default of such issue, to such uses as *Wm. Lord Byron* by deed or will should appoint; and in default of such appointment to the use of *Wm. Lord Byron* in fee. With a power to him in the mean time to lease for 21 years under the usual restrictions.

[251]

By indenture of bargain and sale of the 12th of *July* 1773, between the said *Wm. Lord Byron*, *Wm. Byron* his only son,
and

and certain trustees, for making a tenant to the præcipe, and suffering a recovery to bar the entail, and for limiting the *Rochdale* estate to new uses; the intended recovery (which was afterwards suffered at *Lancaster* assizes in *August* 1773) was declared to enure to the use of such person or persons, and for such estate or estates, and subject to such powers, provisoes, and conditions, &c. as *Wm. Lord Byron* and *Wm. Byron* (his son) should by any deed appoint; and in default of such joint appointment, then as the said *Wm. Byron*, in case he should survive the said *Wm. Lord Byron*, should by any deed appoint; and in default of and until such appointment, to the same uses as were directed by the act of parliament.

1807.

—
KEENE
against
DEARDON.

[252]

By deed of settlement of the 13th of *November* 1773, between *Wm. Lord Byron*, *Lady B.* and *Wm. B.* their only son, of the first part, and certain trustees and creditors of the four other parts, reciting (inter alia) certain mortgages on the *Nottinghamshire* estates in 1745, and the act of 1747, and several annuities granted in 1756 by *Lord B.* for his own life, and other annuities and charges on the same estates, and a conveyance in 1772 by *Lord B.*, his lady, and son, of certain estates in *Nottinghamshire* to secure some of the said annuities; remainder to such uses as they should jointly appoint; and in the mean time to the same uses as were settled by the act of parliament; and after securing an additional 500*l.* per annum to *Lady B.* directed the residue of the rents and profits to be received by the person or persons for the time being entitled to the reversion; with a power to the trustee, &c., to sell the premises, and apply the purchase money as *Lord* and *Lady B.* and their son, with the consent of *Gould*, the prior incumbrancer, by deed should direct: and a power by the same three persons, with the same consent, during their joint lives, by deed to revoke the old and limit new uses. And reciting other charges by the same persons on the *Nottinghamshire* estates; and subject thereto, to the like uses as before mentioned. And reciting the indenture of the 12th of *July* 1773 for suffering a recovery of the *Rochdale* estate to the uses before mentioned; which recovery was accordingly suffered in *August* following. And reciting further, that *Wm. Lord B.* alone, and that he and his son jointly, were indebted to divers persons, in large sums of money, in part secured by judgments, and that the interest of their debts and annuities

[253]

1807.

—
KEENE
against
DEARDON.

[254]

nuities *greatly exceeded the annual income of the whole estates, and that their creditors were very pressing*, and that they could only redeem themselves by sale of part of the estates; and that they had agreed with the trustees and incumbrancers that all the prior uses should be revoked, and a prior annuity of 700*l.* to *Wm. Byron* the son be extinguished; and in lieu of it that certain estates in the county of *Nottingham* should be settled for securing to *Wm. B.* an annuity of 310*l.*; and subject thereto to the use of Lord *B.* for life, &c.; *remainder to Wm. B. in fee*: and that a term should be created of all the other estates in *Nottinghamshire* for raising 11,000*l.* portions for younger children in discharge of the other settled estates; and that the reversion of the *Nottinghamshire* and all the *Lancashire* estate should be vested in trustees *to sell* the same; and out of the purchase-money of the *Nottinghamshire* estates to pay all the specialty debts of Lord *B.* and *Wm.* his son, and also to pay *Wm. B.* 200*l.* and the residue to Lord *Byron*. And that the money arising by sale of certain premises in *Nottinghamshire* and of the *Lancashire* estate *should be laid out in the purchase of other estates*, to be settled to trustees conditionally to raise 385*l.* per annum for *Wm. B.* during the joint lives of himself and Lord *B.* and subject thereto to Lord *B.* for life, remainder to secure 500*l.* to Lady *B.* for life, *with remainder to Wm. B. in fee*—the deed proceeded to revoke the prior uses, and to appoint the *Rochdale* estate in *Lancashire*, and other estates in *Nottinghamshire*, to new uses; with a covenant to levy fines, &c.: and the estates were thereby conveyed to the trustees *Heaton* and *Kennett*, and their heirs, to the following uses; as to part of the *Nottinghamshire* estate, to secure 115*l.* per annum to *Wm. B.* during the joint lives of himself and Lord *B.*: and subject thereto, to the use of Lord *B.* for life, remainder for a term of 80 years to secure 500*l.* per annum to Lady *B.*; remainder to *Wm. B.* in fee. In trust, however, to suffer the person entitled to the reversion to take the surplus of the rents of the premises which should not be mortgaged or sold for the purposes aforesaid. And as to other estates in *Nottinghamshire* to the use of other trustees for a term of 1200 years, upon trust by sale or mortgage, to raise the 11,000*l.* for portions, &c. and to pay the surplus to *Heaton* and *Kennett*. And as to the last-mentioned premises, subject to the said term, and also as to the estate of *Rochdale* in *Lancashire*,

1807.

 KEENE
 against
 DEARDON.

cashire, to the use of *Heaton* and *Kennett*, and their heirs, upon trust, that they or the survivor should, *with the consent as well of the said Lord Byron, Lady B., and Wm. B., or the survivor of them, as of Gould, (the prior incumbrancer) in writing, sell the inheritance in fee*, subject as to certain parts to the term of 1200 years; and on further trust that *Heaton* and *Kennett*, and the survivor, &c. should apply the money arising by sale of the *Nottinghamshire* estates, first in discharging the specialty debts, joint or several, of *Lord Byron* and *Wm. Byron*, and redeeming their annuities charged on these estates; next to pay *Wm. Byron* 2000*l.*, and the residue to *Lord Byron*, to enable them to discharge their other debts; and *should stand possessed of the money arising by sale of the Lancashire estate, &c. on the trusts after-mentioned: with a proviso, that the rents, issues, and profits, as well of the premises comprised in the term of 1200 years as of the Lancashire estate, &c., should, until sale of the inheritance, be received by such person and for such uses as the same rents, &c. would have been if these presents had not been made and no fines levied.* And as to the money arising from the sale of the *Lancashire* estates, &c. in trust to *invest the same, with the approbation of Lord and Lady Byron and Wm. B. &c. in the purchase of other lands in fee*, to be settled to the use of the trustees of the term of 1200 years, or some other person to be appointed by *Wm. Byron*, for the term of 60 years, if *Lord B. and Wm. B.* should so long live, to secure his annuity of 385*l.*; remainder to *Lord B.* for life, remainder to *Lady B.* to secure her annuity, &c. remainder to *Wm. B. in fee.* With other provisions not material. By deed-poll of the 14th February 1774, executed by *Gould, Lord B. and Wm. B.*, it appeared that 50,500*l.* was raised by sale of estates in *Nottinghamshire*, to facilitate which, *Gould*, by direction of the other two, granted and released those estates to the trustees.

Sir V. Gibbs, Park, and Heywood Serjt. shewed cause, and contended, first, that under the deeds of 1773 the fee was not executed in the late *Lord Byron*. Under the act of parliament he took an estate for life, remainder to his son *William* in tail male, with a *reversion in fee to himself.* But by the deed of November 1773, after the recovery suffered, which barred the entail, the *Nottinghamshire* and *Lancashire* estates were conveyed to trustees, in trust to sell the whole, and out of the purchase-

1807.

—
KEENE
against
DEARDON.

[256]

money of the *N.* estate to pay the joint and several specialty debts, and redeem the annuities, of Lord *B.* and his son, and to apply the surplus in the manner therein directed : and to lay out the purchase-money of the *L.* estate, with the approbation of Lord and Lady *B.* and their son, or the survivor of them, and the consent of *Gould*, the incumbrancer, *in the purchase of other lands* to be settled to the use of trustees for securing certain payments ; remainder to Lord *B.* for life, &c. ; *remainder to Wm. Byron in fee* : with a proviso that until the sale of the inheritance, the *rents, issues, and profits* should be received by such person and for such uses as were before settled. Under the new settlement, therefore as Lord *B.* took only a life estate, with remainder to his son *Wm.* in fee, the use could not be executed in the late lord, so as to enable him to pass the legal estate in the reversion to the defendants claiming from him by purchase ; but it must be executed in the trustees and their heirs, to enable them to sell and execute their trust. Secondly, supposing the legal title in the trustees, there could be no presumption of a reconveyance by them to Lord *B.* to the old uses ; because that would have been a breach of trust, which cannot be presumed. *Wm. Byron*, for whom as well as for his father, they were trustees, was a purchaser for a valuable consideration of the remainder in fee, which was to be limited to him in the newly purchased lands, by having joined in barring his former estate tail, and charging the *Nottinghamshire* property with the payment of his father's debts and annuities. The trustees could not have conveyed in fee to Lord *B.*, without the consent of his son, which cannot be presumed in disherison of himself. Then the proviso, that *till the sale, the rents, issues and profits* should go to and be enjoyed by such person, &c. as before the fines levied, could not alter the disposition of the legal estate : the surviving trustee would still be entitled to the possession, in order to enable him to sell in pursuance of the trust, though the rents in the mean time were payable to Lord *B.* during his life. At any rate, if there were any equity arising on the face of the deeds in favour of Lord *B.*, cognizance could only be taken of it by a court of equity. It having been suggested by one of the defendant's counsel that he meant to contend that it ought also to have been left to the jury to presume that the trustees had in execution of their trust sold the *Lancashire*

[257]

cashire

cashire estate, and that Lord *B.* had been the purchaser.] They answered that the presumption had not been put upon that ground at the trial : but even that could not be sustained without imputing a breach of trust to the trustees, in having applied the purchase-money to their own use, instead of laying it out in the purchase of other lands ; which, if it had been so applied, was capable of direct proof. And no such presumption arose of necessity from Lord *B.*'s possession for so many years, as that was consistent with the deed of *November 1773*, and must be referred to that, unless a subsequent conveyance to him as a purchaser from the trustees were proved. The third objection, upon the point of adverse possession by Lord *B.*, and the defendants who claimed from him for 20 years before this ejectment was brought, was abandoned : for, as was observed, the possession of *cestuy que trust* can never be said to be adverse to his trustees ; and the conveyance to the defendants, whose possession alone could be said to be adverse to the trustees, was only in 1795.

Cockell Serjt., Topping, Wood, and Yates, in support of the rule, contended, first, that the use was not executed in the trustees under the deed of *November 1773*, nor was it necessary that they should have the legal estate for the purposes of that deed. By the deed of *July 1773*, to lead the uses of the recovery, the estate was to be limited to such uses as Lord *B.* and his son jointly, or as the son, if he survived his father, should appoint ; and in default of and until such appointment the recovery was to enure to the same uses as were directed by the act of parliament ; under which Lord *B.* had an estate for life, with the reversion in fee, after an estate tail in his son. The express object of the deed of *November 1773* was to relieve Lord *B.* and *Wm.* his son from the pressure of their debts ; both of whom, it appears from the recital, were much involved. For this purpose the *Nottinghamshire* estates were at all events to be sold, and the purchase-money applied in discharge of the debts, and after payment of a certain sum to *Wm. Byron*, the overplus, if any, to go to Lord *B.* But the *Lancashire* estate, which it was considered might not be required for the payment of the debts, was not to be sold at all *without the joint consent of* Lord and Lady *B.* and their son (with the approbation of *Gould* the incumbrancer), or the survivor of them ; and *until the sale* it was

1807.

KEENE
against
DEARDON.

[258]

1807.

—
KEENE
against
DEARDON.

[259]

provided that the *rents, issues, and profits*, which are in effect all the interest in the land, was to be received by such persons and for such uses as they would have been if that deed had not been made and no fines levied. In substance, therefore, the estate stood limited to the old uses till the sale; and only a *power* of selling was reserved to the trustees upon the contingency of Lord and Lady *B.* and their son, or the survivor of them, consenting to it. All these persons are now dead: *Wm. Byron* died about 30 years ago leaving a son who is also dead: Lady *B.* died about 11 years ago: *Wm. Lord B.* survived the others, and is now dead: so that this part of the trust is now incapable of being executed for want of the consent of competent parties. The contingency, therefore, never happened which was to supersede the old uses, which old uses were to remain until those three persons or the survivor consented to the sale. In *Roper v. Radcliffe* (a) Ld.C.J. *Parker* says that a trust to sell is but a *power* till executed; and that if one seised in fee give power to his executors to sell his lands, and to pay the money or surplus to his heirs; till that power be executed, the old fee descends to the heir. Here the case is stronger against the execution of the use in the trustees before the sale; because they had no discretion in making the sale; but it depended upon the contingency of the owners consent. There is no direction in this case for the trustees to receive and *pay over* the rents, &c. till sale; which would have executed the use in them. Here then was no trust to be executed by the trustees before sale. 2dly, Lord *Byron* having been in possession of the premises in question since 1747, treating them as his own, without any interference of the trustees, and no other title appearing to the world except under the act of parliament, the defendants, who were purchasers for a valuable consideration, without notice, after the death of *Wm. B.* and his son, and the extinction of the estate tail, which let in the old reversion, are entitled to have every presumption made in their favour which the law will allow of. Admitting, therefore, that the legal estate was in the trustees by the deed of *November 1773*; yet as it appears that 50,000*l.* was raised by the sale of the *Nottinghamshire* estates in 1774, the first presumption to be made is that that was sufficient to liquidate the

(a) 9 *Mod.* 190.

debts and to answer all the purposes of trust, since no other act has been done from that time by the trustees; and therefore they must be presumed to have reconveyed the *Rochdale* estate to the old uses. At no time could * that estate have been sold without the consent of Lord *Byron*, and as he survived Lady *B.* and his son, he may well be presumed to have notified to the trustees that he would not consent to the execution of the power of sale by them under the deed of *November 1773*, and to have called upon them for a reconveyance of a legal title. This, if it had been done in the lifetime of the son, and with his consent, would in no event have been a breach of trust. Nor if done after his death; for the remainder in fee was only limited to him in the event of a sale of the *Rochdale* estate and the purchase of another estate; but Lord *B.* never consented to such a sale, and without his consent, who was the survivor of his wife and son, it could never take place. And, independent, of this contingent remainder in fee to the son, there was an ample consideration moving to him to join as tenant in tail in charging the *Nottinghamshire* estate with his father's debts, as provision was also made for the liquidation of his own debts out of the same fund during the life estate of his father. It ought therefore, to have been left to the jury to say, whether, under all the circumstances, such a reconveyance had not been made to the old uses, which might consistently have been made without any breach of trust? [*Per Curiam.* The defendants were not prevented from going to the jury upon this presumption, if they had insisted upon it; but instead of that they preferred taking the opinion of the judge, whether the presumption, ought not to be made: and he thinking that the jury ought not to make it, they acquiesced. The question, therefore, must now be argued as if it had been left to the jury with the Judge's opinion against the presumption; and it is only competent to the defendants' counsel to contend that, under these circumstances, the Judge ought to have directed the jury differently.] It was said by Lord *Kenyon*, in *Doe v. Sybourn* (a), and in *Roe v. Reade* (b), that in all cases where trustees ought to convey to the beneficial owner, he would leave it to the jury to presume such a conveyance, where such a presumption might

1807.

—
KEENE
against
DEARDON.
*[260]

[261]

(a) 7 Term Rep. 3.

(b) 8 Term Rep. 122.

1807.

KEENE
against
DEARDON.

reasonably be made : and that cannot apply more strongly than to a case where the trust could not be further executed for want of Lord *Byron*'s consent. [*Le Blanc* J. We must consider how the interest of *Wm. Byron* would stand upon this construction. He who was tenant in tail of both estates had consented to the sale of the *Nottinghamshire* estate for the purpose of paying his father's debts, upon condition that both the estates should be sold, and new estates purchased, which were to be settled upon his father for life, *remainder to himself in fee*. He and his heirs would therefore be deprived of his consideration, if, in consequence of his father having survived him, the old use were to be executed in his father ; or if the trustees had reconveyed to the old uses. How then can we say that they must be presumed to have made such a reconveyance?] The payment of the son's debts in the lifetime of the father was a fair consideration for the son's consent, and any further consideration was made optional in the father during his life, who might conscientiously refuse it, especially after the son's death. But, 3dly, if the other presumption be not made, it may be presumed at this distance of time in favour of purchasers for a valuable consideration, without notice, that the *Rochdale* estate was sold by the trustees in execution of their trust, with the consent of the necessary parties, together with the rest of the property ; and that Lord *Byron* himself was the purchaser ; and his undisturbed possession for so many years, treating the estate as his own, without any intervention of the trustees, would be evidence of such a purchase.

[262]

Lord ELLENBOROUGH C. J. Three points were made on moving for the rule in this case ; one of which, namely, an adverse possession for above 20 years against the trustees, has been since abandoned. The remaining points now insisted upon are, 1st, that the use was executed in Lord *Byron* under the deeds of 1773 : or, if not, 2dly, that the trustees must be presumed to have conveyed to him, either because the trusts were all satisfied ; or, as it has also been argued, as to a new purchaser under a sale by the trustees. First, the conveyance of *November* 1773 is to trustees and their heirs for certain uses ; amongst others, in trust, to sell the estates in *Nottinghamshire*, and thereout to pay the debts of Lord *Byron* and his son, and for other purposes mentioned : and as to the *Rochdale* estate, to the

the use of the trustees, *Heaton and Kennett* and their heirs, upon trust, that they or the survivor should, with the consent of Lord and Lady *Byron* and their son, or the survivor of them, &c. sell the inheritance in fee, subject to a certain term, and invest the purchase money, with the like consent, in the purchase of other lands in fee, to be settled to the use of the trustees of the term; remainder to Lord *Byron* for life, &c.: remainder to *Wm. Byron* in fee. It cannot be doubted, upon these words, but that the use would be executed in the trustees under that deed. But it is argued that the effect of those words is controlled by the proviso, stating that the *rents, issues, and profits* should, *until sale of the inheritance*, be received by such person and for such uses as the same rents, &c. would have been if that deed had not been made and no fines levied. That, however, is nothing more than the common provision in such cases for the perception of the rents and profits by the persons beneficially entitled at the time until the sale, and by no means carries the legal estate to such persons. And in order to found the argument that it did, the defendants' counsel were driven to contend, that the words *rents, &c.* were of equal import in the place where they occur with the word *inheritance*; and this, notwithstanding it is evident that the former words are used in the proviso in contradistinction to the latter. Instead, therefore, of shewing that nothing more than a mere *power of sale* was intended to be given to the trustees, the wording of the proviso confirms the construction which would naturally arise from the other parts of the deed, and shews that the meaning of it was to leave the legal estate in the trustees, to whom it was before limited for the general purposes of the deed; stipulating only that the *rents, issues, and profits*, as contradistinguished from the *inheritance*, should, until a sale took place, be received by those who are beneficially entitled to them. Then, as to the presumption of a reconveyance from the trustees to Lord *Byron*; presumptions of this sort, when fit to be made, are always made in favour of the possession of those who are rightfully entitled to it. The rule of presumption is, *ut res rite acta est*; and is applied, wherever the possession of the party is rightful to invest that possession with a legal title. But there is nothing to warrant such a presumption in this case: the possession of Lord *Byron* was all along consistent with the deed

1807.

—
KEENE
against
DEARDON.

[263]

and

1807.

—
KEENE
against
DEARDON.
*[264]

and with the title of the trustees; for until a sale by the trustees * Lord *Byron* was entitled to the possession by the trusts of the deed. The trustees could not control his right to the receipt of the rents, issues and profits during his life. There was not, therefore, one moment of adverse possession to the trustees during the whole time down to a recent period; nor any such possession by Lord *Byron*, nor any other claiming from him, in favour of which there should be a presumption of any conveyance to him; a presumption which could only be made on the supposition of a direct breach of trust by the trustees, whose duty it was, in case of a sale, to have purchased new estates to be settled on Lord *Byron* for life only, with remainder to *Wm. Byron* in fee. And the law will not raise a presumption upon a supposed breach of trust.

GROSE J. not having been in court when the case was argued by some of the counsel on a former day, declined giving any opinion upon it.

LAWRENCE J. The third ground of objection originally taken to the verdict having been abandoned, it is not necessary to advert to it. Then as to the first objection, that the use was executed in Lord *Byron*; in order to found the argument, the clause which follows last in the deed by way of proviso is put forward as the first and substantive limitation: whereas the use is clearly executed in the trustees by the first part of the deed, unless the effect of the proviso is to over-ride the whole and to precede the other limitations. As it stands, the *Rochdale* estate is limited to the use of the trustees, in trust to sell it, with the consent of the parties interested, and to re-invest the purchase-money in other lands to be settled to different uses.

[265]

This would execute the use in the trustees; but as before sale the rents, issues, and profits of the estate were to be received by somebody, it is provided in the subsequent clause that, till sale of the inheritance, they should be received by such persons as would have been entitled to them under the former settlement, if the deeds of 1773 had not been made. In the first place, therefore, there is an absolute conveyance to the trustees, to give them the legal estate, and enable them to sell &c., and apply the purchase-money; and then a proviso declaring how the rents, &c. should go in the meantime. The second point made, is, whether, under the circumstances, a re-conveyance to

Lord

Lord *Byron* is to be presumed. This is pressed on the authority of cases where Lord *Kenyon* said that he would direct the jury to make such a presumption where the trustees *ought* to convey. And in order to shew that they ought to have conveyed in this case, it is insisted that after the death of Lady *Byron* and her son *William* the trust was for the sole benefit of Lord *Byron*: but how can we say that, when it appears that *Wm. Byron* had joined in barring his estate-tail in all the estates, and enabling the trustees to raise money by sale of the *N.* estates for the payment of his father's debts, reserving to himself the remainder in fee of the property which was to be newly purchased out of the proceeds of the *Rochdale* estate when that should be sold? How can we say the trustees ought to be presumed to have conveyed that title to Lord *Byron*, which he had no right to ask them to convey, in prejudice to those claiming from his son? But if Lord *Byron* had an equitable estate in the premises, and *Heaton* and *Kennett* were trustees for him alone after the death of his wife and son; let that first be decided by a Court of equity, and then that court may, if it think proper send the case to a jury to say whether they will not presume a re-conveyance. As to Lord *Byron's* being a purchaser, under a sale by the trustees, of this estate, there is nothing in fact to raise the presumption.

1807.

—
KEENE
against
DEARDON.

[266]

LE BLANC J. The point of adverse possession to the trustees for 20 years was properly given up: for when it is considered that Lord *Byron* till a sale was entitled to the possession and to the receipt of the rents and profits consistently with the deed, and did not convey to the defendants till 1795, it is impossible to say that there was any adverse possession to bar the trustees from recovering in this ejectment. Then as to the use being executed in Lord *Byron*; the argument can only arise by coupling the proviso with the previous limitation of the use to the trustees, and making it take place of the use before executed in them. But that would be contrary to the form and effect of the deed, by which the use is executed in the first instance in the trustees, subject to the trusts afterwards declared, and subject to the proviso that until sale the persons before entitled should receive the rents, issues, and profits. It is said, however, that giving the rents, issues, and profits to those persons is the same as giving them the estate: and it may be so where

1807.

—
KEENE
against
DEARDON.

[267]

where there is no conveyance of the land itself to others, and where the instrument does not in the terms of it point to a distinction between them, but here the legal estate is distinctly separated by the terms of the deed from the rents, issues, and profits; and these latter are given to one person, and the legal estate to others. Then it is contended that the jury should have been directed to presume a re-conveyance of the legal estate from the trustees to Lord *Byron*. Such a presumption may be made where it is necessary to clothe a rightful possession with a legal title: but the Court must first see that there is nothing but the form of a conveyance wanting. And in no case can such a presumption be made where it would have been contrary to the duty of the trustees to have reconveyed to the party. And though if there had been shewn to be a clear equitable title in Lord *Byron* to the remainder in fee, the Court might have directed such a presumption to be made in this case; yet, if a doubtful equity only appeared, a court of law would not give such a direction before a court of equity had declared in favour of the party's equitable title. Now here Lord *Byron* having originally an estate for life, with remainder to his son in tail, remainder in fee to himself; and it being considered that in the course of nature the son would survive the father; they came to an agreement that the *Nottinghamshire* estates should be sold, to pay their debts; and that the *Rochdale* estate should, with the joint consent of the father, mother, and son, and of the survivor of them, be sold, and the purchase-money applied to the purchase of a new estate, which was to be limited to Lord *B.* for life, remainder to his son in fee: providing that in the mean time, and until the sale of the estate, the rents, issues, and profits should be received by the person who was before entitled to them: Therefore, till Lord *Byron* consented to the sale, his possession and receipt of the rents, issues, and profits were consistent with the very terms of the deed, and with the object of the trust; and consequently there is no ground for presuming a conveyance of any description.

Rule discharged.

1807.

HODINOTT *against* Cox.Tuesday,
Feb. 10th.

BURROUGH had moved to change the venue from *London* to *Somersetshire*, in an action of covenant on a lease of certain silk mills, and a stream of water thereunto belonging; in which breaches were assigned for diverting the water from the mill, and for not keeping up the water to its former level: the grounds of the motion being, that the greater part of the defendant's witnesses lived in *Somersetshire*, and that a view would be necessary.

Marryat now opposed the rule, on affidavits, stating that more of the plaintiff's witnesses lived in *London* than in the country, and that it would be more expensive to him to try it at the assizes than at the sittings: and urged that it was not usual to change the venue in actions on specialties, except, as in *Foster v. Taylor (a)*, where *all* the witnesses resided in the county to which the trial was removed. And he attempted to shew by the pleadings that the cause might as well be tried with the aid of a map as by a view. But

The Court, considering that a view would be desirable in this case for the furtherance of justice, made the rule absolute, on the defendant's undertaking to have a view, and to admit the lease.

(a) 1 Term Rep. 781.

In covenant upon a lease, a view being proper to be had, the venue was changed to the county where the premises lay; though most of the plaintiff's witnesses resided in the county where the venue was laid.

The KING *against* BARTRUM.[269]
Tuesday,
Feb. 10th.

THIS was an indictment for perjury, found at the Sessions, and removed into this court by certiorari. Notice of trial was given to the defendant by the prosecutor for the sittings at *Westminster*, and the indictment entered for trial: but when it was called on in turn, the prosecutor was not ready; on which the defendant desired it might not be struck out of the paper,

and withdraw his record without countermanding his notice in time, costs to the defendant,

Upon an indictment for perjury removed into *B. R.* by certiorari, if the prosecutor give notice of trial to the defendant, he shall pay

but

1807.

—
The KING
against
BARTRUM.

but stand as the last cause. And when it was again called on, the prosecutor withdrew the record,

Garrow thereupon moved, on the first day of the term, for a rule upon the prosecutor to shew cause why he should not pay to the defendant his costs for not proceeding to trial pursuant to notice: grounding his application upon the general jurisdiction of the Court to prevent its process from being used to the oppression of the subject; and referring to *Rex v. Heydon and Others* (a) where the same thing was done in the case of informations for bribery. And he also produced an affidavit that the prosecutor had since declared that he did not mind ruining himself if he could ruin the defendant.

Lawes, contrà, endeavoured to throw some doubt upon the legality of the practice, as applied to indictments for public misdemeanors in general, especially one of so serious a complexion as the present: and said that the practice was calculated to discourage prosecutions. But,

[270]

Lord ELLENBOROUGH C. J. said, that upon enquiry it appeared to have been the established practice of the Court, that if the prosecutor give notice of trial to the defendant, and do not try his indictment, nor countermand the notice in time, he must pay the costs of the trial as in other cases: for otherwise defendants might be harrassed and oppressed with unnecessary expence. That Lord *Mansfield*, in the case referred to, laid down the rule generally, saying that such was the constant course of the Court: and that the precedents referred to in the margin (b) of the report bear out the proposition.

Per Curiam,

Rule absolute.

(a) 3 *Burr.* 1304.

(b) *Rex v. Allev and Hazard*, *Comb.* 225. *Rex v. Edwards*, *Ib.* 410. and *Salk.* 193. *Rex v. Powel*, 1 *Stra.* 33. and *Rex v. Earl*, 2 *Stra.* 874. and vide *Rex v. Lowfield*, 2 *Stra.* 937. and *Rex v. Moore*, *Ib.* 946.

1807.

The KING *against* The Mayor and Burgesses of
THETFORD. *Wednesday,*
Feb. 11th.

WILSON on a former day applied on the stat. 11 G. 1. c. 4. s. 2. for a rule calling on the defendants to shew cause why a writ of mandamus should not issue commanding them upon the day and at the time to be prefixed in such writ to assemble themselves in the *Guildhall* of the borough, &c. and then and there proceed to the election and swearing in of two principal burgesses of the borough in the room of *W. R. Mingay Esq.* and *J. Rolfe Esq.* deceased. He stated the constitution of the borough, under a charter of *Elizabeth*, to consist of a mayor, 10 principal burgesses, and 20 of the commonalty, incorporated by the name of the mayor, * burgesses, and commonalty of the borough of *Thetford*, in the counties of *Norfolk* and *Suffolk*. That the 10 principal burgesses were, together with the mayor, constituted the common council of the borough for acts and ordinances concerning the public interests of the inhabitants of the borough. And that when any burgess should die or remove out of the borough, or be removed from his office for any reasonable cause, it should be lawful for the mayor and burgesses from time to time, as they should think fit and expedient, *within eight days next following* the death or removal of the said burgess, in the *Guildhall* or other convenient place within the borough, to meet at their will, and there to nominate one or more inhabitants of the borough to be a burgess or burgesses of the said borough *during life*, if it should seem good and expedient to the mayor and the other burgesses; and that every person so named and chosen should take an oath before the mayor to execute his office faithfully. The affidavit then stated the death of *Mr. Mingay*, one of the principal burgesses, in *November* last, and the death *Mr. Rolfe*, another of them, in *December* last, and that the vacancies had not been filled up.

A charter having granted that upon the death or amotion of a principal burgess (*who is appointed to hold for life*) it should be lawful for the mayor and the remaining principal burgesses *within eight days next following* to elect another: the eight days after a vacancy having slipped without an election, a mandamus was granted upon the stat.

11 G. 1. c. 4. s. 2. to make an election.

*[271]

When the motion was made, *Lawrence J.* asked whether there were any instance of a mandamus granted upon the stat. 11 G. 1. c. 4. s. 2. except in the case of *annual* officers: and there

1807.

—
 The KING
against
 The Mayor
 and Bur-
 gesses of
 THETFORD.
 [272]

there being no precedent of any such referred to, or within the recollection of the officers of the Crown office, it was intimated that an inquiry should be made into the matter, and that the rule should not be made absolute, without directing the attention of the Court to the question. This was now done; and *The Court*, after being apprised that the principal burgesses were appointed for life, and that the charter required the vacancies to be filled up within eight days; which had been slipped; and being referred to the case of the corporation of *Scarborough*, (a), which was the case of a mandamus upon the statute to elect annual officers, and to the case of *Rex v. Woodrow* (b), referring to the former; upon due consideration of the words of the statute; which are not confined to annual officers, but directs the mandamus to issue if no election be made of the mayor, bailiffs, or other chief officer or officers of the borough, upon the day, or *within the time* appointed by charter or usage for that purpose; made the

Rule absolute (c.)

(a) 2 *Stra.* 1180. Mr. *Ford's* note of this case has not the word *annual*, which is introduced in Sir *John Strange's* Report: but it runs thus: "It was likewise moved for a mandamus to be directed to such of the capital burgesses as were capital burgesses in the year 1736 to proceed to the election of coroners and *other officers*, according to the statute, &c. So that no stress seems to have been laid upon the circumstances of such *other officers* being *annual officers*." The proper title of that case is "*The King against Vickerman and Others*."

(b) 2 *Term Rep.* 732.

(c) Vide the case of *Hicks against The Town of Lameston in Cornwall*, 1 *Roll. Abr.* 513, 514. where it was ruled by two Judges in court, that if the king create a corporation consisting of a mayor and eight aldermen, with a clause, that upon the death or amotion of any alderman it shall be lawful for the mayor and the other aldermen, *within eight days after* such death or amotion to elect another alderman in the place of the other, &c.; although there be no election *within the eight days* after the death, &c. yet they may elect an alderman at any time afterwards by the power incident to them as a corporation: and this affirmative power to elect within eight days does not toll their incidental power. *E. 8. Car. 1 B. R.* and a writ was granted accordingly to elect another alderman.

1807.

KENSINGTON *against* INGLIS and Another, in Error. *Thursday, Feb. 12th.*

THE plaintiffs below brought their action in *C. B.* against the defendant, an underwriter on a policy of insurance made the 5th of *February* 1800, lost or not lost, at and from the *Havannah* and *Matanzas*, or any other port or ports in *Cuba*, to *Nassau*, *New Providence*, upon goods, and also upon *ship or ships sailing between the 1st of October 1799, and 1st of June 1800 inclusive*; beginning the adventure on the goods from the loading thereof on board the said ship or ships in the island of *Cuba*; and upon the said ship or ships, &c.: with liberty to proceed to and touch and stay at any ports or places whatsoever: valued at — on goods and specie, covering commission and all charges incident to loss: at six guineas per cent. premium; warranted free from captures* and seizures and the consequences of any attempt thereof. The declaration averred

1. Where a licence to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, and did not know

what was become of it, having afterwards searched for, but not recollecting the finding it, and thinking that he had not found it; this is reasonable and probable evidence of the loss of such licence, so as to let in parol evidence of its contents; the paper not being considered as of any further use at the time; and the witness's attention not having been then called particularly to the circumstances. And the witness may speak to the contents of the licence from memory, though he had made an entry of it in his memorandum book for the private information of himself and the governor; which book was not produced, he having given it to the governor, who was gone abroad without returning it to him: for such book, if in court, would not have been evidence per se; but could only have been used by the witness to refresh his memory.

2. Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st of *October* 1790 and the 1st of *June* 1800: a memorandum written on the policy on the 11th of *June*, extending the time of sailing to the 1st of *August* 1800, does not require a new stamp; being within the 13th section of the stat. 35 *Geo.* 3. c. 63. which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the *terms or conditions* of any policy, &c.

3. Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, was licenced by the king's authority: held that an insurance on the *enemy's ship*, as well as on the goods and specie put on board for the benefit of the *British* subjects, was incidentally legalized; and that it was competent for the *British* agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue.

* [274]

1807.

KENSINGTON
—
against
INGLIS
and Another,
in Error.

that the defendant subscribed the policy for 500*l.* on goods and specie on board of ship or ships sailing between the 1st of *October* 1799 and the 1st of *June* 1800 inclusive, for the voyage : and that afterwards, on the 6th of *May* 1800, by a certain memorandum written upon the policy, it was agreed that *the value of any vessel or vessels that should carry the goods thereby insured* should be included in that insurance; and *that the property which should first sail to the extent of 45,000*l.* insured* should be considered the interest, in that insurance: and that by another memorandum written on the policy on the 11th of *June* 1800 it was agreed *to extend the time of sailing to the 1st of August* 1800. That on the 14th of *July* 1800, a large quantity of goods and specie were loaded on board a certain ship called the *Hector*, at the *Havannah* in *Cuba*, upon the said voyage; that from thence, until and at the time of the loss after mentioned, one *Robert Read*, for whose use and benefit the insurance on the goods and specie was made, was interested in such goods and specie; and one *Juan Villas*, for whose use and benefit the insurance on the ship was made, was interested therein. That the said ship, with the said goods and specie on board, afterwards, between the 1st of *October* 1799 and the 1st of *October* 1800, to wit, on the 18th of *July* 1800, sailed upon the voyage insured from the *Havannah*, and before her arrival at *Nassau* was lost, with the said goods and specie on board, by the perils of the sea. And then followed an averment that the ship, goods, and specie were free from captures and seizures, and the consequences of any attempt thereof. In the second count it was alleged that the *Hector*, on board which the goods and specie were loaded at the *Havannah*, *was not a ship belonging to his majesty or any of his subjects*. There were also counts for money paid and money had and received. Plea, Non assumpsit. A verdict was found for the plaintiffs by the direction of the Lord Chief Justice, to whom a bill of exemptions was tendered at the trial; which being sealed by him, was, together with a transcript of the record, handed over to this Court.

[275]

The bill of exceptions stated, that the cause was tried before the Lord Chief Justice of *C. B.* at the sittings of nisi prius at *Guildhall*, when the counsel for the plaintiffs below, in order to maintain the issue on their part, gave in evidence the policy of insurance as set forth in the declaration, stamped with such
stamp

stamp duty as, at the time of making the policy, was by law required for the same; together with the memorandum thereon mentioned to have been made on the 6th of *May* 1800. That the policy was effected by the plaintiffs below, and that the defendant *Kensington*, being a natural born subject, subscribed the same as an assurer for 500*l.* on the 5th of *February* 1800; and that on the 6th of *May* 1800 he subscribed the memorandum of that date. It was also proved that the memorandum, dated the 11th of *June* 1800, and written before the loss happened, importing to be an agreement for extending the time of sailing, was subscribed by the defendant; but that it had no stamp upon it; and was proved to have been signed subsequent to the 1st of *June*, but before any notice of the determination of the risk had been received. The plaintiff's counsel further proved, that between the 1st of *October* 1799 and the 1st of *August* 1800, viz. in *December* 1799, a certain cargo of goods and specie belonging to *Robert Reid* had been shipped at the *Havannah* in the island of *Cuba* on his account, being part of the property insured, and had been safely landed at *Nassau*, in the island of *New Providence*, on the 4th of *January* 1800; and that certain other cargoes of goods and specie belonging to *R. Read* had been shipped at the *Havannah* on his account, and had sailed on the voyage insured; one of such cargoes on the 20th of *June* 1800, which was shortly after captured; and another on the 15th *July* 1800, which arrived safely at *Nassau* on the 28th of the same month: for which cargoes, as well as for the ships which carried the same, the defendant has received his proportion of credit, and thereby the loss has been reduced to 63*l.* 10*s.* 6*d.* per cent. on the policy. Whereupon the counsel for the defendant below objected to the last-mentioned memorandum being admitted in evidence, on account of its not being stamped: but the Chief Justice admitted it in evidence, and it was read as follows; "agreed to extend the time of sailing to the 1st of *August* 1800. *London*, 11th *June* 1800." The plaintiff's counsel further proved, that after the 1st of *June* and before the 1st of *August* 1800, viz. on the 14th of *July*, certain goods and specie belonging to *R. Read* were shipped at the *Havannah* in *Cuba*, on his account, on board the *Hector*; and that the policy was made in respect of the said goods and

1807.

KENSINGTON
—
against
INGLIS
and Another,
in Error.

[276]

1807.

—
 KENSING-
 TON
 against
 INGLIS
 and Another,
 in Error.
 [277]

specie for his benefit; and in respect of the said ship, for the benefit of the said Juan Villas; and that *Juan Villas was a Spaniard by birth, then and still residing in the dominions of, and adhering to the king of Spain, between whom and our sovereign there existed an open war, as well at the time of effecting the policy, and from the 1st of October 1799 until the 1st of August 1800, as also at the time of the trial of the issue; but that the action was commenced in time of peace between the king and his Catholic majesty.* And the plaintiff's counsel further gave in evidence, that the *Hector*, with the goods and specie on board her, on the 18th of *June* 1800 sailed from the *Havannah*, which was under the dominion of the king of *Spain*, upon a voyage for *Nassau* in *New Providence*, one of the *Bahama* islands, and a colony then under the dominion of the king; but was in the course of such voyage wrecked on the 21st of *July* 1800 by the perils of the seas; in consequence whereof an average loss occurred upon the matters insured by the policy to the amount of 36*l.* 10*s.* 6*d.* per cent. &c. The plaintiff's counsel further proved that by virtue of certain instructions from the king, dated the 28th of *March* and the 27th of *August* 1798, General *Dowdeswell*, then Governor of the *Bahama* islands, was authorised to grant licences for the importation into those islands of specie and such goods and merchandizes as were loaded on board the ship *Hector* in any *British* or *Spanish vessel* of the same built as that ship, from any *Spanish colony* in *America*, notwithstanding the then existing hostilities: and the commanders of his majesty's ships of war and privateers were enjoined not to detain or molest any vessel trading between the ports therein specified, conformably to the said regulations, and having a licence for that purpose. And in order to shew that the ship *Hector* was so licensed, the said counsel examined a witness, one *Dawson Kelly* Esq. who had been the secretary to the said governor, and who proved that he had been secretary to the governor of the *Bahama* Islands for near four years, until *April* 1801, when he left *New Providence*. That he was well acquainted with the nature of the trade from the *Havannah* to *New Providence*, which in time of war is carried on by means of licences from the governor. That he knew the ship *Hector*, and *Robert Read*, who was a merchant at *New Providence*, where he publicly carried

[278]

ried on trade with the *Spanish* settlements during the whole time the witness resided at *New Providence*. That he recollected that a licence was granted by the said governor to Robert Read, for the *Hector*, for the voyage insured; and that Robert Read, after the loss of the *Hector*, brought back the licence to New Providence, and returned it to him the witness. That it was his, the witness's, custom to destroy or put aside such licences among the waste papers of his office, as not being of any farther use, and that he supposes he disposed of the licence in question in the same manner as other licences for ships, whose voyages had been performed; but is not sure it was destroyed. That the witness was afterwards applied to for this licence by R. Read, and searched for it; but does not recollect whether he found it or not: though he does not think that he did find it. That the licence was for the voyage out and home, according to the form then used in the *Bahama* Islands, and was not limited in point of time: and it was to enable the *Hector* to come from the *Spanish* settlement to *New Providence*. That he asked R. Read for the licence, as was customary, and is certain that R. Read returned it him after the loss. That the licences granted were in a printed form, containing all the several goods allowed to be imported, and were afterwards filled up with the names of the captain, and the ship, and the voyage. That the witness knew the *Hector* to be a *Spanish* vessel the property of a *Spaniard*; and that she was so described in the licence; and a certain *Spaniard*, whose name the witness does not remember, was therein stated to be the master. That formerly licences were granted in blank; but that was prohibited before the time when the said licence was granted to the *Hector*. That by the laws of *Spain* vessels coming from a *Spanish* settlement in time of war cannot clear for a *British* port; but that it is the practice for them to clear for some other *Spanish* or a neutral settlement. That the witness kept a memorandum book, in which he made entries of the licences for his own and the governor's information: that they might know what licences had been granted. That he does not know where the said book is now; that he gave it to the governor when he came to England in 1801; and that the governor is now in the *East Indies*; and the witness does not know what the governor did with the book. That the licence was granted before there was any re-

1807.

—
KENSINGTON
against
INGLIS
and Another,
in Error.

[279]

1807.

—
**KENSING-
 TON**
against
INGLIS
 and Another,
 in Error.

[280]

gulation at *New Providence* respecting a limited time for the duration of the voyage. That he does not recollect how many licences were granted to *R. Read* between *October 1799* and *October 1800*; but thinks there might be ten or twelve. That Governor *Dowdeswell* was at *New Providence* between three and four years up to *April 1801*; and that during the whole of this time *R. Read* publicly carried on trade with the *Havannah*. Whereupon the defendant's counsel, having before long resisted any *parol evidence* as to the contents of the supposed licence for the ship *Hector*, objected that the voyage and trade insured, and on which the *Hector* was lost, being altogether illegal unless authorized by a regular licence; and no licence for the ship, nor the before-mentioned *book*, being produced, no action could be sustained for the aforesaid loss. And they further objected, that notwithstanding the voyage and trade should have been licenced, and the licence satisfactorily proved, the plaintiffs could not in a court of law enforce a policy for the benefit of *Juan Villas*, so being such alien as aforesaid. But the Chief Justice delivered his opinion, that it was sufficiently established in proof by competent evidence, that the *Hector* had been duly licenced for the voyage upon which she was lost; and his opinion also, that a ship belonging to an alien might, when so licensed, be lawfully insured by a British subject; and that the policy effected therein might be enforced in a court of law for the benefit of such alien owner thereof. And with that direction he left the issue to the jury, who thereupon gave a verdict for the plaintiff, with 300*l.* damages. Whereupon the counsel for the defendant excepted to the aforesaid opinion and direction of the Chief Justice, as well in respect to the establishment in evidence of such supposed licence, as in respect to the plaintiff's right to maintain an action for the interest of *Juan Villas*: and also in respect of the admissibility of the unstamped memorandum of the 11th of *June 1800*.

In the course of the argument it was attempted to be contended, on the part of the plaintiff in error, that the licence itself was void, either as an infringement of the colonial navigation laws, which confined the trading of our colonies to this country, and could not be dispensed with by the licence of the kind alone; or supposing such a dispensing power in the king.

jure

1807.

KENSINGTON
against
INGLIS
and Another,
in Error.

[281]

jure coronæ in matters of trade, yet that he could not delegate such discretionary power to any other person, and consequently could not enable the governor of the *Bahama* Islands to grant the licence in question. But all the Court agreed that the plaintiff's counsel was precluded from insisting upon this objection, inasmuch as it arose, if at all, out of the evidence stated in the bill of exceptions; in arguing which the plaintiff in error was confined to the objections taken at the trial, and stated on the face of the bill of exceptions: as had been lately decided in the House of Lords, in a case of *Rowe v. Power* (a), on a bill of exceptions from *Ireland*. Whereas the present bill of exceptions rather proceeded upon the admission that such a licence, if it existed in fact would be good: for it insisted that the voyage and trade insured were illegal, *unless authorized by a regular licence*, and that there was no *competent evidence* of such a licence. On the other parts of the case,

Marryatt, for the plaintiff in error, objected, 1st, that there was not sufficient evidence of the licence. 2dly, That the memorandum of the 11th of *June*, inasmuch as it varied the original contract in the policy, could not be given in evidence without a new stamp. 3dly, Supposing the licence and memorandum to have been properly authenticated; yet that the policy being upon the *ship* as well as upon the *goods*, the former of which was the property of an alien enemy, the action was not maintainable in time of war for his benefit. First, he argued that there was no sufficient proof of the loss of the licence itself to let in the secondary evidence of its contents: and at any rate that the secondary evidence given was not the best which the nature of the case afforded, for want of producing the secretary's memorandum-book, in which the entries of the licences granted had been made. The full substance of this objection, and the arguments urged in support of it, being stated in the judgment afterwards delivered, need not to be here repeated. 2dly, He contended that the memorandum of the 11th of *June* so far varied the contract stated in the policy as to require a new stamp, and did not come within the exception of the 15th sec-

(a) 2 *New Rep.* 36.

1807:

KENSING-
TON
against
INGLIS
and Another,
in Error.

tion of the stat. 35 *Geo. 3. c. 63. (a)*. It was not merely an alteration of the terms or conditions of the same voyage before insured, but introduced altogether a new subject of insurance. The precise subject of insurance was marked only by the time mentioned in the original policy; for neither the ships nor the particular goods were mentioned: it intended only to such specie and goods to a certain amount as should fail in any ship or ships within a given time: the original time therefore made an essential part of the description of the thing insured: that expired on the 1st of *June*; and it was not till the 11th that the extension of time was agreed upon; within which extended time the loss happened. The risk, therefore, had attached upon the first class of ships which sailed within the period mentioned in the policy, and was at an end before the risk on the second class described in the memorandum commenced, which was to sail within a different period. The insurance on the second class could never have attached on the first. Even an insurance on the same ship for five months, to commence after the expiration of an antecedent insurance on it for six months, would be a distinct contract; a fortiori, therefore, if the two insurances were made on goods on board different ships. 3dly, At any rate all insurance of an enemy's property is illegal (*b*); and no action can be maintained, *flagrante bello*, for the benefit of an alien enemy residing in the hostile country; though the action were commenced and plea pleaded during an interval of peace. *Lit. s. 198*. Nor does it vary the case that

[283]

(a) The stat. 35. *G. 3. c. 63. s. 13*, provides that the act shall not extend "to prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance, duly stamped as aforesaid, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration; so that such alteration be made before notice of the determination of the risk originally insured, &c.; and so that the thing insured shall remain the property of the same person or persons; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by reason or means of such alteration."

(b) *Potts v. Bell*, 8 *Term Rep.* 548.

the action is prosecuted in the name of an agent who is a *British* subject; as in *Brandon v. Nesbitt* (a), and *Bristow v. Towers* (b): and the objection may be taken at any time before judgment (c), if it in any manner appear upon the record, though not regularly pleaded; in which case the judgment is that the plaintiff be barred from further having or maintaining his action. In *Ricord v. Bettenham* (d), indeed, an action upon a ransom bill given in war to an alien enemy was maintained in time of peace; but no such action is maintainable in time of war (e). It is no answer to say, that the trade itself having been licensed, every thing necessary for the carrying it on must be licenced. For the licence, which is the sole act of the king, cannot do more than dispense with the peculiar rights and prerogatives of the crown. It protects the trader from the capture of *British* ships at sea: it allows him to import the goods, and exempts them from seizure when landed; it dispenses with the forfeiture to the crown, either as a droit of admiralty or otherwise: but it cannot remove his personal disability, as an alien enemy, to sue either in his own name or in the name of his trustee; a disability founded in the common law, for the benefit of the king's subjects: it cannot place him in the condition or give him the privilege of a natural born subject in this respect.

The Court told *Carr*, for the defendants in error, that he need not argue the first point, as to the admissibility of the evidence of the licence: for the facts stated shewed either that the original was actually lost or destroyed, or at least that it was put in a necessary course of destruction; and could not now be expected to be produced. That the same sort of evidence of the probable destruction of an original paper was admitted upon the trial of *Mr. Justice Johnson* (f).

Carr then argued upon the second point, as to the necessity of a new stamp on the memorandum, that the property insured, which was goods and specie to a certain amount, remained the same, as did the voyage and the risks: the only difference between the memorandum and the policy was an extension of the

1807.

KENSINGTON
—
against
INGLIS
and Another,
in Error.

[284]

(a) 6 *Term Rep.* 23.(b) *Ib.* 35.(c) *Le Bret v. Papillon*, 4 *East*, 502.(d) 3 *Burr.* 1734.(e) *Anthon v. Fisher*, *Dougl.* 648, n.(f) 7 *East*, 66.

1807:

KENSINGTON
—
against
INGLIS
and Another,
in Error.

[285]

time of sailing from the 1st of June to the 1st of *August*; which was no more in effect than an alteration in a warranty or condition of the former policy, that the ship or ships should sail within a given time, which the memorandum dispenses with for two months longer. The statute only requires that the alteration shall be made before notice of the determination of the *risk*; and though the memorandum were not made till after the 1st of *June*, yet the *risk* might well continue long after that time, which was the original limit of the ship's *sailing*: and certainly no notice was received of its determination when the memorandum was made. Sdly, As to the objection that this is an action brought for the benefit of an alien enemy; if the contract of insurance were lawful at the time of making it, and there be no personal disability in the plaintiff to sue upon it, this case does not fall within any of the cases cited. The object of the licence was the importation of specie from the *Spanish* colonies into our own, which is of great importance to the prosperity of the latter, and has always been favoured by the legislature. The statutes 27 *Geo. 3. c. 27.*, 30 *Geo. 3. c. 29.*, 31 *Geo. 3. c. 28. s. 7.*, 32 *Geo. 3. c. 37.*, and 37 *Geo. 3. c. 77.* have all relaxed the system of the colonial navigation laws in this and similar respects. In like manner the king has relaxed in favour of this trade his belligerent rights, by granting licences of this description from time to time. And by his general instructions of the 28th of March 1798 to the governors of colonies, commanders and others, he authorizes the carrying on of this trade in *Spanish* ships, and orders them to be received as friends in our colonial ports. The trade is illegal in the subjects of *Spain*, and highly penal in its consequences, and every encouragement and protection on our part is necessary to induce them to engage in it. The king's licence, therefore, is for the benefit of the kingdom. And that he has power to licence the trading with an enemy is recognized in many of the books, and lately by Lord *Kenyon* in *Vandyck v. Whitmore (a)*. Then if the trading be legal, it follows that all other contracts incident to such trading, usual and proper for carrying the licence into effect, must be legalized also. The trade is expressly autho-

(a) 1 *East*, 475.

rized to be carried on in *Spanish* ships; and the *English* owner must therefore contract with the *Spanish* captain for freight. The amount of freight must depend on the expences and risks of the voyage: by so much, therefore, as they may be diminished by insurance, the freight will be so much less. It was lawful for *Read* to have agreed with *Villas*, in consideration of the latter risking his ship in the voyage for *Read's* benefit, to pay him for it in case of a loss. This would be the same in effect as an insurance of it. And unless *Villas* could have insured his ship, engaged in such a mercantile adventure for the benefit of an *English* subject, and licenced by the king, he would have demanded so much more freight. So it would have been lawful for *Read* to have bought the goods for so much less at the mouth of the port of the *Havannah*, in consequence of taking upon himself the risk of the voyage to *Nassau*. That in substance would be a contract of insurance; and the difference of the price at the *Havannah* and at *Nassau* is the amount of the premium of insurance. The *Spaniard* cannot insure in his own country, because there the trade is illegal: unless, therefore, he can insure here, the *English* subject must pay so much more for the goods as the risk would be valued at, or else the *Spaniard* will not engage in the trade at all. If then the trade must be carried on, if at all, in *Spanish* vessels; for no others can clear out of their harbours; and it cannot be carried on at all without paying the *Spaniard* for the risk of the voyage in some shape or other; the licence to insure the *Spanish* ship is consequential upon the licence to trade, and is in truth most beneficial for the *British* subject. But it would be nugatory to permit the *Spaniard* to insure his ship, if, in case of a loss, the contract of insurance could not be enforced against the underwriter. The cases referred to against the right of action by or in behalf of an alien enemy do not apply; because there the trading was without licence, and therefore illegal in the subject. But here the sovereign, to whom is confided the power of peace and war, has remitted the rights of war in respect of the trading in question, and extended his protection to it. Public writers (a) on the law of nations say, that the party li-

1807.

KENSINGTON
against
ENGLIS
and Another,
in Error.

[286]

[287]

(a) *Bynck. Quest. Jur. Pub. b. 1. c. 3.*

1807.

KENSINGTON
—
TON
against
INGLIS
and Another,
in Error.

censed is to be considered as if in amity with the sovereign who grants the licence. The plaintiff on the record is a *British* subject, in whom there is no personal disability; and the Court will not take notice of any trust for the purpose of working injustice. If the ship had been taken as prize and libelled in the Admiralty, no doubt the party might have sued there (a) in consequence of the licence. [Lord *Ellenborough* C. J. observed that there were common law authorities to shew that an enemy coming here under a safe conduct might sue in our court (b).]

Marryat in reply said, that in *Wells v. Williams* the distinction was taken between an alien enemy residing in his own country and one residing here under a safe conduct; the latter of whom only could sue in the courts here. That this was an attempt to extend the privileges of the licence beyond what it was meant to convey. It was special in the terms of it, not even to trade generally, but in a particular instance; and still less to sue. That the legality of the contract would not give authority to sue upon it; for however legal and moral it might be at the time it was entered into, yet if the contracting party were of another nation, with which we were afterwards engaged in hostilities, he could not sue here during the war. Indeed every plea of alien enemy was founded upon an admission of the legality of the contract when made, and objected only to the personal disability of the party to sue.

Cur. adv. vult.

[288]

LORD ELLENBOROUGH C. J. now delivered the judgment of the Court. After stating the record, upon which the writ of error was brought, and also the bill of exceptions tendered to the opinion and direction of the Chief Justice delivered upon the trial at nisi prius—

The counsel for the defendant below, the now plaintiff in error, relied upon three exceptions to the opinion of the Chief Justice, as delivered at nisi prius: 1st, that the existence of any regular licence authorizing the voyage and trade in question, which were illegal unless so authorized, was not proved by any

(a) The case of the *Hoop*. was referred to, 1 *Rob*, 210, &c.

(b) Vide *Wells v. Williams*, 1 *Salk*, 46.

competent evidence. That the voyage and trade in question might be so authorized was not disputed. 2dly, That the plaintiffs upon this record could not in a court of law enforce by suit a policy for the benefit of a person, who, at the time of effecting the policy, and when the risk attached, and also at the time of the trial, was an alien enemy. 3dly, That the unstamped memorandum of the 11th of *June* 1800 was not admissible in evidence, as competent to extend the original time of sailing described in the policy, from the 1st of *June* to the 1st of *August* 1800 (*a*). As to the first of these exceptions; there is no doubt that the original existence of the licence in question was competent to be proved in the manner it was, by parol; provided its loss, after due search made for the purpose of finding it, was sufficiently established. The habit of the governor's secretary to destroy or put aside such licences amongst the waste papers of his office, as not being of any further use, was proved; and that he supposed he had dealt with the licence in question in the same manner, though he were not sure he had destroyed it. He recollected an application being made to him for the licence by *Read*, to whom it had been granted, and the fact of his searching for it; but he did not recollect whether upon such search he found it; though he did not think that he found it. We are of opinion that this evidence satisfies what the law requires in respect of search; and establishes with reasonable certainty the fact of the licence being lost. It was not to be expected that the witness should be able to speak with more confident certainty to a fact to which his attention would not be particularly drawn at the time, on account of any importance being supposed to belong to it. As to the non-production of the secretaries memorandum-book, in which he had made entries of licences for his own and the governor's information; that book, if it had existed, and been in the secretary's hands ready to be produced, could not have been produced at the trial in proof of the fact of granting any particular licence: the only use which it could have been allowed to answer being

1807.

—
KENSINGTON
against
INGLIS
and Another,
in Error.

[289]

(*a*) This was the order in which the questions were argued; but in reporting the arguments I have reversed the two last for the benefit of the arrangement.

by

1807.

—
KENSING-
TON
against
INGLIS
 and Another,
 in Error.

by way of memorandum, to refresh the memory of the secretary who made the entries, when he should be called as a witness. The fact of its loss being proved, so as to let in the secondary evidence of its contents; that matter was sufficiently established by parol. And there is no question made as to the legal competence of such a licence to authorize the voyage and trade in question.

[290]

As to the second question, Whether the plaintiffs, upon this record, who are *British* subjects duly competent to sue in their own persons, can in a court of law enforce by suit a policy for the benefit of another person who was an alien enemy when the policy was effected, &c. was so at the trial, and still is so: the negative of his proposition is strongly contended on behalf of the plaintiff in error, on the authority of the cases of *Bristow* and *Towers*, 6 *Term Rep.* 35 and *Brandon v. Nesbitt*, *ibid.* 23. But it will be recollected that in those cases the party interested, and on whose behalf the suit was maintained, was an alien enemy, against whose recovery, through the medium of his *British* trustee, there existed this objection, that the property to be covered by the policy belonged to an alien enemy, and that any protection afforded to such property, by means of a contract of indemnity, directly and materially contravened the public interest, which was concerned in the precariousness or destruction of such property. In the present instance no such public policy of the country is contravened by sustaining and giving effect to such a trust; but, on the contrary, this country, in furtherance of the same policy which allows the granting of licences to authorize the trade, ought to give effect to the ordinary means of indemnity, by which that trade (from the continuance of which the public must be supposed to derive a benefit) might be best promoted and secured. And although the king's licence cannot, in point of law, have the effect of removing the personal disability of the trader, in respect of suit, so as to enable him to sue in his own name; it purges the trust, in respect to him, of all those injurious qualities in regard to the public interest, which constituted the particular ground of objection to the trust in the two cases in 6 *Term Rep.* which have been so much relied upon in argument on the part of the defendant in error. As, therefore, there is in this case no le-

gal incompetence to sue in the parties suing, and no public interest which stands in the way of the maintaining this suit, for the * benefit of those who were the objects of the licence authorizing the trade in question, it does not appear to us that the right of the plaintiffs to recover can be well resisted on this ground.

1807.

—
KENSINGTON
against
INGLIS
and Another,
in Error.
*[291]

The third objection arose on the unstamped memorandum of the 11th of *June* 1800, which was said not to fall within the proviso contained in the 13th section of the stat. 35 G. 3. c. 63. And this objection was shaped two ways; 1st, that the memorandum was in reality made after notice of the determination of the risk originally insured; and, 2dly, that it introduces a new subject of insurance, or thing not before insured. It was argued that it was after notice of the determination of the risk originally insured, because by the terms of the policy the risk insured was goods shipped on board *ships which should sail before the first of June*; and this memorandum was not added till the 11th of *June*; at which time it was notorious that the 1st of *June* was past; and that, therefore, the risk had determined. But this part of the objection is founded on a misapplication of the term "*determination of the risk insured*;" which means that determination of it which is occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage: and this memorandum is stated by the bill of exceptions to have been written on the policy, (as in fact it must have been,) before the loss happened. The second way of shaping this objection to the memorandum was, that, it introduces a new subject of insurance, or thing not before insured; viz. goods on board ships sailing *after* the 1st of *June*; the object of insurance being pointed out or marked only by the time of the sailing of the ships on board which the goods should be. To dispose of this part of the objection, it is not necessary to determine, whether the introduction of a new subject of insurance will, under all circumstances, make a new stamp necessary: inasmuch as we are of opinion that in this case no new subject of insurance is introduced by it. The insurance, as it originally stood upon the policy and the memorandum of the 6th of *May*, was on goods and specie on board of ship or ships, sailing between the 1st of *October* 1799 and the 1st of *June*

1800,

[292]

1807.

—
 KENSING-
 TON
 against
 INGLIS
 and Another,
 in Error.

1800, *being the property WHICH SHOULD FIRST sail to the amount of 45,000*l.**, and upon the vessels which should carry the goods : which in effect is an insurance on property to a certain extent, ascertained by its priority of sailing, with a limitation as to the time of sailing, and also an insurance upon the vessels carrying it. The essential part of the description is the priority of the sailing, and the amount of the property : for after property to that extent had once sailed, the policy could not attach upon any further property exceeding that sum : and if property to a less extent had sailed, a return of premium in proportion to the property sailing short of the sum insured would of course have been demandable by the assured. The property, which it was the object of the policy to cover, was as much ascertained by its *voyage*, and by its being *that which should first sail*, as if it had been described by any other circumstance or mark, by which it might have been distinguished from any other thing : and it was as much the same thing as if it had been a specific chattel, capable of appropriate description by its weight, measure, quality or kind of package : and it would be difficult to shew that an insurance on a thing, the identity of which could be so ascertained, on ship or ships, sailing between the 1st of *October* and the 1st of *June*, was not an insurance on the same thing, if the underwriters should agree by a memorandum to continue insurers on it, if it should sail in any vessel or vessels between the 1st of *October* and the 1st of *August*. The time of sailing would indeed be extended by such agreement, but the object of the insurance would continue the same. So in this case, unless the quantity of property, which to the amount of 45,000*l.* would first sail from the *Havannah* to *Bahama*, and the vessels carrying the same between the 1st of *October* and the 1st of *June* could be different from that, which might first sail on the same voyage between the 1st of *October* and the 1st of *August*, no new subject of insurance is introduced. If the enlarged time of sailing could make property, which might sail, after property to the amount of 45,000*l.* had sailed, the object of the insurance ; that is, if it could make the first last, and the last first, a new subject of insurance would be introduced ; but if it cannot, an extension of the time will not operate to make the policy cover a different thing from that which it originally embraced. For

[293]

if

if before the 1st of *June* property to the specified amount had sailed, the extension of the time could have added nothing to that which the policy would have covered as it originally stood. And if property to that amount had not sailed before the 1st of *June*, the extension of time could only cover with the protection of the policy so much of the original subject of insurance which had not sailed before the 1st of *June*; viz. so much of the 45,000*l.* which should first sail, but had not sailed before that day. And as the priority of sailing will ascertain the identity of the property, it will equally ascertain the identity of the vessels. For these reasons we think there is no weight in the third objection; and that therefore there must be judgment for the defendants in error, the plaintiffs below.

The like judgment was given in other cases on similar policies; some on ships alone, others on goods alone.

1807.
—
KENSINGTON
against
INGLIS
and Another,
in Error.

[294]

EDMONSON *against* EDMONSON.

Thursday, 7
Feb. 12th.

UPON a question of costs, in this case, which was argued in last *Trinity* term by *Littledale* against the rule for taxing the plaintiff his full costs; and by *Yates* in support of it.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was an action upon the case for an injury done to the plaintiff's right of common, by digging turves on the ground where he was entitled to common. At the trial at *Carlisle* before Mr. Baron *Sutton*, there was no question respecting the right of common; and the jury found a verdict for the plaintiff with a penny damages: and the judge has certified under the stat. 43 *Eliz. c. 6. s. 2.* that the damages to be recovered in such action did not amount to 40*s.* A motion has been made to this Court, that the Master may be directed to tax costs for

If in an action on the case for an injury done to the plaintiff's right of common by digging turves there, the Judge certify under the stat. 43 *Eliz. c. 6. s. 2.* that the damages did not amount to 40*s.*, the plaintiff shall have no more costs; for the interest or title

of the land does not necessarily come in question in such action, and did not in fact in this case, where the action was brought against another commoner for a mere wrongful act.

1807.

EDMONSON
against
 EDMONSON.

[295]

the plaintiff, notwithstanding the Judge's certificate; on the ground that the case was not within the statute; *the action being* (as was said) *for a title and interest in lands*; the plaintiff's action resting on his right of common in the land where the injury is complained of, which is a charge on the land. The words of the stat. 43 *Eliz. c. 6. s. 2.* are these: "If upon any action personal to be brought in any of her majesty's courts at *Westminster*, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and be so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to 40s. or above; that in every such case the Court shall not award to the plaintiff any more costs than the debt so recovered shall amount unto, but less at their discretion." The single question is, Whether this action be for any title or interest of lands? And we think it is not. An action on the case for a disturbance of or injury to the plaintiff's right of common is not necessarily an action for any title or interest of lands: it may be brought in order to assert such title, or a right to such interest; or it may be brought against a mere wrong doer, where the plaintiff's title to common is not disputed; or against another commoner, where there is no question on the right of either party; and such was the present case, as reported to us by the Judge who tried the cause. The words of this statute differ from the stat. 22 and 23 *Car. 2.*, which requires a Judge's certificate to entitle the plaintiff to costs, where the damages are under 40s., that the freehold or title of the land was chiefly in question, or that an assault and battery were proved, in all actions of assault, trespass, and other personal actions; which act has been construed to extend only to actions of trespass *quare clausum fregit*, where the freehold or title of land may come in question, and to assault and battery, leaving all other personal actions to the stat. 43 *Eliz.* And in the case of *Styleman v. Patrick*, 2 *Mod.* 141. (a) as far as it is an authority to be relied on, the Court appears to have held an action of this description to have been one in which a Judge

[296]

(a) *Frcem.* 214. S. C.

might have certified under the 43 *Eliz.*, and thereby deprived the plaintiff of his costs, where the damages recovered were under 40s., and the action appeared frivolous to the Judge. We therefore think that in the present case the rule obtained for directing the Master to tax the plaintiff his costs must be discharged.

1807.

EDMONSON
against
EDMONSON.

Rule discharged.

IN this term CHARLES THOMPSON, ANTHONY HART,
HENRY MARTIN, and JOHN LEACH, Esquires, were
appointed His Majesty's Counsel learned in the Law.

END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

1807.

IN THE

Court of KING'S BENCH,

IN

Easter Term,

In the Forty-seventh Year of the Reign of GEORGE III.

IN and about this Term several alterations took place on the Bench and at the Bar.

LORD ERSKINE resigned the Great Seal, which was delivered for the second time to LORD ELDON.

SIR VICARY GIBBS succeeded SIR ARTHUR PIGGOTT as Attorney-General; and THO. PLOMER Esq. was appointed Solicitor-General in the place of SIR SAMUEL ROMILLY, and was knighted.

EDWARD MORRIS Esq. was made a Master in Chancery, in the room of SIR W. W. PEPYS, Bart. who resigned.

THE HONOURABLE SPENCER PERCEVAL, who had filled the office of his Majesty's Attorney-General, was appointed Chancellor of the Exchequer, and Chancellor of the Duchy of Lancaster.

MR. BARON SUTTON was appointed Lord High Chancellor of *Ireland*, and was created a Peer of the United Kingdom, by the stile and title of LORD MANNERS of *Foston*, in the county of *Lincoln*.

[298]

AND GEORGE WOOD Esq. succeeded LORD MANNERS as a Baron of the Exchequer, and was thereupon called Serjeant, and gave rings with this motto: "Moribus ornes, legibus emendes;" and in *Trinity* Term following he was knighted.

1807.

Wednesday,
April 15th.

KEENE, on the Demise of Lord BYRON, *against*
DEARDON and Others.

The Same *against* STOTT and Others.

The Same *against* LOMAX and Others.

Though the stat. 16 & 17 Car. 2. provides that no execution in ejectment shall be stayed unless the plaintiff in the writ of error shall be bound for the costs in case judgment be affirmed, &c. yet by reasonable construction it is sufficient if he procure proper sureties to enter into the recognizance of bail; but these may be examined as to their sufficiency, which the plaintiff in error himself cannot be. The practice is to take the recognizance in double the improved rent, and the single costs of the ejectment.

THE lessor of the plaintiff having obtained verdicts and entered up judgments in these ejectments, the defendants brought writs of error; and upon the rules for the allowance, *Marryat* adverted to the words of the stat. 16 & 17 Car. 2. c. 8. s. 3. enacting, "that in writs of error brought upon any judgment after verdict in any action of *ejectione firmæ*, no execution shall be stayed unless the plaintiff or plaintiffs in such writ of error shall be bound unto the plaintiff in such action of *ejectione firmæ* in such reasonable sum as the Court to which such writ of error shall be directed shall think fit," &c. conditioned, if the judgment be affirmed, &c. to pay costs, &c.: and then objected that *Deardon* and *Stott*: who were plaintiffs in error respectively in two of the cases, had not joined, nor were present in court and prepared to join, in the recognizances, but only two sureties in each;* which did not satisfy the statute, which requires the plaintiffs themselves to enter into the obligation. But

The Court, after some consideration, agreed, that, though the words of the act seemed to require in ejectment a recognizance by the plaintiff in error himself; yet they must put a reasonable construction upon them; and as an infant plaintiff could not enter into such recognizance, nor a plaintiff who had become a feme covert after the action brought; and as the legislature could not have meant to exclude infants and feme coverts from the benefit of the act; they must put such a construction upon it as would apply to all plaintiffs in error; and therefore they thought that in reason and substance the act would be satisfied by plaintiffs in error procuring responsible persons to enter into the obligation required. *Wood*, for the plaintiffs in error, on this point referred to *Impey's Practice*, 706.

It next became a question in what sum the recognizance should be taken; and upon *Wood* referring to *Thomas v. Goodtitle*

title (a) it was agreed that the sureties in *Deardon's* case should enter into recognizance for double the improved rent and the single amount of the costs of the ejectment, as they were then calculated at; (for they had not yet been taxed;) and accordingly *Deardon's* sureties and *Stott's* sureties justified now in court. But the Court would not permit *Lomax*, the plaintiff in error in one of the ejectments, who was himself prepared in court to enter into the recognizance, to be examined as to his sufficiency; though the sureties in the other cases were so examined.

(a) 4 *Burr.* 2501.

APPLEBY *against* DODS.

1807.

KEENE
against
DEARDON
and Others.

[300]

Saturday,
April 18th.

IN assumpsit for a seaman's wages, it appeared at the trial at the last sittings at *Guildhall*, that the plaintiff served as a mariner on board a *West India* ship belonging to the defendant, under the usual articles, which stated the ship to be "bound for the ports of *Madeira*, any of the *West India* islands, and *Jamaica*, and to return to *London*:" and in consideration of "the monthly or other wages there mentioned," the seamen severally undertook to "perform the above-mentioned voyage:" and the master agreed with and hired them "for the said voyage at such monthly wages, to be paid pursuant to the laws of *Great Britain*:" and the seamen bound themselves to do their duty, &c. as seamen "at all places where the ship should put in or anchor during the said ship's voyage; and not to go out of the same on board any other vessel, or be on shore on any pretence whatsoever, till the voyage was ended, and the ship discharged of her cargo, without leave, &c. and in default thereof to be liable to the penalties mentioned in the statutes 2 *G.* 2. c. 36 and 37 *G.* 3. c. 73. "And it was further agreed that no seaman, &c. shall demand or be entitled to his wages, or any part

Seamen enter into articles to serve for monthly wages on board a ship "bound for the ports of *Madeira*, any of the *West India* islands and *Jamaica*, and to return to *London* ; and it is agreed that they shall not demand or be entitled to their wages, or any part thereof until the arrival of the ship at the port of discharge, &c. meaning *London*: held

that though the ship earned freight upon the delivery of an outward-bound cargo at *Madeira*, and of another cargo taken in at *Madeira* and delivered in the *West Indies* ; yet that being lost in her passage home by a storm the seamen could not recover wages pro rata upon the outward voyage, by reason of the express terms of the stipulation respecting wages.

1807.

APPLERY
against
DONS.

[301]

thereof, until the arrival of the said ship at the above-mentioned port of discharge, and her cargo delivered," &c. It was proved that the ship sailed from Gravesend on the 11th of February 1806, with a full cargo of goods for Madeira, which she delivered there in April, and there took in a full cargo of wine, part of which she afterwards delivered at Dominica; and from thence proceeded to Kingston in Jamaica, where she delivered other part of the wine, and took in government stores for Port Antonio, another part of Jamaica, which were there delivered; and then proceeded to Martha Bray, in the same island, where she arrived on the 28th of June, and delivered the remainder of the wine shipped at Madeira: and then loaded with sugars, &c. for London, and sailed on the 27th of July, and was afterwards lost at sea on the 28th of August, in the course of her passage home. And thereupon it was contended on the part of the plaintiff, that the voyage being by the terms of it divided into three parts, first to Madeira, next to the West Indies, and then home; and freight, which is called the Mother of Wages, having been earned in the two first stages of the voyage; he was entitled to recover his wages pro ratâ for so many entire months (the reservation being monthly) as had elapsed between the original inception of the contract and the 27th of July when the ship sailed from Martha Bray, her last port of delivery in Jamaica. And in aid of this construction it was remarked, that though in the clause restricting the demand for wages "until the arrival of the ship at the above mentioned port of discharge, the word Port is there used in the singular number; yet that considering the whole tenor of the agreement, and that in the previous part of it the ship is described to be "bound for the ports of Madeira," &c. (in the plural,) and that the voyage was divisible into three distinct parts, so as for the ship to have earned freight on the two first parts, though she were lost on her return home; the word port, in the latter part, must be construed reddendo singula singulis, as applicable to each port of discharge in the course of the voyage. Lord Ellenborough, however, was of opinion that the true construction of the articles founded on the policy of the act of the 37 Geo. 3. c. 73. excluded the plaintiff from recovering wages pro ratâ, inasmuch as the ship never arrived at her port of discharge, which he considered to be London; and thereupon nonsuited the plaintiff.

[302]

1807.

APPLEBY
against
DODS.

Wigley now moved to set aside the nonsuit, upon the grounds before-mentioned; distinguishing this case, where the ship was lost in the last division of the voyage by the perils of the sea, without any default of the mariners, from cases where a mariner wilfully deserts his ship in any stage of the voyage; which it was the peculiar object of the statute 37 Geo. 3. c. 73. to prevent in this trade. And he referred to an anonymous case in 1 *Ld. Ray.* 639.; where, in an action for a seaman's wages, Lord *Holt* said that if the ship be lost *before* the first port of delivery, then the seamen lose all their wages; but if *afterwards*, then they lose only those from the last port of delivery. But if they run away, although they have been at a port of delivery, they lose all their wages. This probably refers to the same case reported afterwards (a) as having been ruled by him at the trial at *Guildhall*: which was the case of a ship bound to the *East Indies*, and from thence to return to *England*; which was unladen at a port in the *East Indies*, and took freight to return home, and was captured in the course of the voyage: where he held that the mariners should have their wages for the voyage to the *East Indies* and half the time they staid there to unload. But he relied principally on *Edwards v. Child and Others*, and the *East India Company* (b), where the captain of a ship in the Company's service took bonds from the seamen not to demand any wages till the return of the ship to the port of *London*, nor to demand any if she were lost before her return. The ship, after delivering her outward-bound cargo in *Bengal*, was captured on her voyage home. And in action brought by the mariners against the captain, tried before Lord *Holt*, they recovered four months wages which became due at *Bengal*, the first delivering port, notwithstanding the bonds were given in evidence. And the same point was ruled in *Buck v. Rawlinson*, in the House of Lords (c).

[303]

(a) 1 *Ld. Ray.* 739. et vide *S. C.* 12 *Mod.* 409. et vide *ib.* 442.; and *Hernaman v. Bawden*, 3 *Burr*, 1844, in which latter case no freight was earned in the first part of the voyage; and *Abernethy v. Landale*. *Dougl.* 539, where the ship was captured before her first port of delivery. And vide many other cases on this subject collected in *Cutler v. Powell*, 6 *Term Rep.* 320. and *Chandler v. Grieves*, cited in 2 *H. Blac.* 606.

(b) 2 *Vern.* 727.(c) 1 *Bro.* *P. C.* 102.

1807.

—
APPLEBY
against
DODS.

[304]

LORD ELLENBOROUGH C. J. The terms of the contract in question are quite clear and reasonable : they relate to a voyage out to *Madeira* and any of the *West India* islands, and to return to *London* : and there is an express stipulation “ that no seaman shall demand or be entitled to his wages, or *any part thereof*, until the arrival of the ship at the above-mentioned port of discharge,” &c. which must refer to *London*. And though the reason of this stipulation was, no doubt, to oblige the mariners to return home with the ship, and not to desert her in the *West Indies* ; yet the terms of it are general, and include the present case ; and we cannot say, against the express contract of the parties ; that the seamen shall recover *pro ratâ*, although the ship never did reach her port of discharge named. The anxious policy of the legislature to enforce the return home of seamen in their ships from the *West Indies*, in addition to the forfeiture of wages, has also given penalties in case of disobedience to their personal obligations.

LAWRENCE J. The case before Lord *Holt* was rightly decided upon the general principles of law, arising on the contract, whatever counter remedy there might have been upon the bonds. And the Court of Chancery afterwards, in giving relief to the representatives of the captain, against whom the recovery was had at law, upon a bill filed against the ship owners and the Company, might have considered that there was something unreasonable in the bargain.

Per Curiam,

Rule refused.

1807.

MADDOCK *against* RUMBALL and Another.*Saturday,
April 18th.*

THE plaintiff declared upon a bond dated the 19th of *November* 1803, for 972*l.* 9*s.* conditioned to be void if the defendants or either of them, their heirs, &c. should on or before the 19th of *November* 1804, purchase and make good 908*l.* 16*s.* 7*d.* 3 per cent. consolidated Bank Annuities, and transfer or cause the same to be transferred into the name of the plaintiff, his executors, &c. for his and their benefit; and also if the defendants, &c. should in the mean time, and until such purchase and* transfer of the said 908*l.* 16*s.* 7*d.* 3 per cents, &c. should be made as aforesaid, pay, or cause to be paid to the plaintiff, his executors, &c. all such sums of money as would have become due and payable to the plaintiff, &c. in respect of the dividends, interest, and produce of the said 908*l.* 16*s.* 7*d.* 3 per cents, &c. in case the said 908*l.* 16*s.* 7*d.* 3 per cents had been on the day of the date of the said writing obligatory standing in the name of the said plaintiff, and had continued to stand in his name until the said 19th of *November* 1804, at such times as such interest and dividends would in that case have become due and payable at the Bank of *England* without any deduction or abatement thereout: and then assigned for breach that the defendants did not, on or before the 19th of *November* 1804, purchase or make good the sum of 908*l.* 16*s.* 7*d.* 3 per cents, &c. or transfer the same into the plaintiff's name, &c.: and so negatived the performance of the terms of the condition.

The plea craved oyer of the bond and of the condition; which latter stated in substance, that whereas the defendant *Rumball* had given his bond, dated 10th *April* 1797, to the plaintiff, in the penal sum of 942*l.* 6*s.* 8*d.* conditioned to pay 471*l.* 3*s.* 4*d.* within five years from the 25th of *March* 1797, with interest at 5 per cent. payable quarterly, the first payment to be made on the 24th of *June* ensuing; and that the principal money was still owing, together with 15*l.* 1*s.* 2*d.* for interest, making together 486*l.* 4*s.* 6*d.* And whereas the plaintiff,

The defendant being indebted to the plaintiff in 486*l.* 4*s.* 6*d.*, for which he was sued; and the plaintiff wishing to invest the amount of the debt in stock on the 19th of *November* 1803, when the same would have purchased 908*l.* 16*s.* 7*d.* stock; in consideration of forbearing his action and demand till the 19th *November* 1804, takes bond from the defendant, conditioned for the transfer by him to the plaintiff on that day of 908*l.* 16*s.* 7*d.* stock, with such interest as the same would have produced, as such stock, in the mean time: held that this was neither usurious, nor within the prohibition of the stock-jobbing act, 7 *Geo.* 2. c. 8.

*[305]

1807.

MADDOCK
against
RUMBALL
and Another.
*[306]

having brought his action for the debt against *Rumball*, wished to invest the same in the purchase of 3 per cent. stock; and *Rumball*, being then unable to pay the same, had, in order to induce the plaintiff to forbear in his demand and action, agreed * at the end of 12 months to discharge the same by transferring so much stock in the 3 per cent. consols, in the name of the plaintiff, his executors, &c. as 486*l.* 4*s.* 6*d.* would at the then present day's price of stock purchase; and in the mean time pay the plaintiff, &c. the interest and dividends which would have become due and payable at the Bank of *England*, upon such stock, in case the same had been at that time standing in the plaintiff's name, and had continued to stand in his name until the expiration of the said 12 months: and for further security for transferring such stock, and paying such interest and dividends in the mean time, had prevailed on the defendant *Andrews* to join him in the bond: and in consequence of such joint security the plaintiff had consented to stay proceedings in the action, and to forbear to recover payment of his principal and interest against *Rumball*, and to accept such stock, and such interest and dividends in the mean time, in lieu of and in satisfaction for his said principal money, and interest due and to grow thereon. And whereas the average price of stock in the 3 per cent. consols, at the then present day, was 53*l.* 10*s.* for 100*l.* stock, therefore the said sum of 486*l.* 4*s.* 6*d.* would according to that rate purchase 908*l.* 16*s.* 7*d.* 3 per cent. consols. The condition was, &c. (as before set forth in the declaration.) And then the defendants pleaded, 1st, non est factum. 2dly, that the writing obligatory was so made, with such condition, upon a corrupt contract for securing the payment, by the means and in the manner in the said condition mentioned, of the said 486*l.* 4*s.* 6*d.* then due and owing from the defendant *Rumball* to the plaintiff, as in the condition mentioned; whereby there was corruptly reserved above the rate of 5 per cent. interest, &c. contrary to the statute, &c. There were other like pleas assigning the usury in a different form, but with reference to the same facts. The replication denied the usury as alleged in the several special pleas.

[307]

At the trial before Lord *Ellenborough* C. J. at the last sittings at *Guildhall*, the facts were proved as stated in the condition; and his lordship having left it to the jury to say whether this
were

were a fair transaction or a mere colour for usury, they found for the plaintiff. On which

Lawes now moved either for a new trial or in arrest of judgment; contending that the consideration of the bond as set forth in the condition was usurious upon the face of it, however fairly intended by the parties; as it was evident that more than 5 per cent. interest was received by the plaintiff for the loan of the 486*l.* 4*s.* 6*d.* during the twelvemonth, upon the then price of the stocks.

But all the *Court* agreed that this was not usury; as the amount of the sum to be paid by the defendant depended upon a contingency: and if the stocks had fallen in the mean time to 50*l.* the plaintiff would have received less than his principal and legal interest would have amounted to. That this was no more usury, than an agreement to replace stock lent; which though once contended to be usury, if more than the principal and legal interest were thereby obtained, had been long settled to be legal. If indeed this had been a mere colour for usury, it would not have availed; but that was negatived by the jury, and nothing appeared to impeach the fairness of the transaction.

Lawes then contended that this was a transaction within the prohibition of the stock-jobbing act, 7 *Geo.* 2. *c.* 8. on which the judgment ought to be arrested: for the plaintiff was not before possessed of any stock, which could be the subject matter of a loan; but it was an agreement for the future transfer of stock in payment of an antecedent money engagement; which differs this from the case of *Saunders v. Kentish (a)*, where there was a loan of the stock itself, which it was optional in the borrower to sell out or not, and which might therefore have been returned in specie to the lender.

Per Curiam. This was in effect a loan of stock. The plaintiff would have purchased stock at the price it stood at on the 19th of *November* 1803, if he had received his debt then; but he was content to take his debt in stock, to the same amount at a future day: that is the case with every contract for the replacing of stock. The intention of the parties to a loan of stock is that it should be sold, and the same quantity of stock re-purchased at a future period by the borrower.

Rule refused.

1807.

MADDOCK
against
RUMBALL
and Another.

[308]

(a) 8 *Term Rep.* 162. Vide also *Shepherd v. Johnson*, 2 *East*, 211.

1807.

Saturday,
April 18th.

WINTER against BROCKWELL.

A parol licence to put a sky-light over the defendant's area, (which impeded the light and air from coming to the plaintiff's dwelling-house through a window) cannot be recalled at pleasure after it has been executed at the defendant's expence; at least not without tendering the expences he had been put to: and therefore no action lies as for a private nuisance, in stopping the light and air, &c., and communicating a stretch from the defendant's premises to the plaintiff's house by means of such sky-light.

THIS was an action on the case for a nuisance, wherein the plaintiff complained, that being lawfully possessed of a dwelling house with the appurtenances* in *Long Acre, &c. (Westminster)*, into which the light and air entered by means of a window from a certain open area between the said window and an adjoining house; by means of which open area also noisome smells which came from the adjoining house evaporated, without occasioning any nuisance to the occupier of the plaintiff's house; the defendant wrongfully placed a sky-light over the area above the plaintiff's window, by means of which the light and air were prevented from entering the plaintiff's window into his house, and noisome smells arising from the adjoining house were prevented from evaporating, and entered the plaintiff's dwelling-house, &c. Plea the general issue. At the trial before Lord *Ellenborough* C. J. at the last sittings at *Westminster*, the defence set up was that the area which belonged to the defendant's house had been inclosed and covered by a sky-light in the manner stated, with the express consent and approbation of the plaintiff, obtained before the inclosure was made, who also gave leave to have part of the frame-work nailed against his wall. But some time after it was finished the plaintiff objected to it, and gave notice to have it removed. But his lordship was of opinion, that the licence given by the plaintiff to erect the sky-light, having been acted upon by the defendant, and the expence incurred, could not be recalled, and the defendant made a wrong-doer; at least not without putting him in the same situation as before, by offering to pay all the expences which had been incurred in consequence of it: and under this direction the defendant obtained a verdict.

† *Wigley*, (in the absence of the *Attorney-General*) now moved for a new trial: but after stating the point (a),

*[309]

†[310]

(a) A doubt was also suggested, which was stated and over-ruled at the trial, whether a parol licence, as this was, was good by the statute of frauds, as relating to an interest in land. See *Wood v. Lake*, *Sayer's Rep.* 3, and *Crosby v. Wadsworth*, 6 *East*, 602.

Lord

Lord ELLENBOROUGH C. J. said, that the Attorney-General, who led the cause at the trial, had himself mentioned this case at the beginning of the term, in the argument of the case of the quarriers in the isle of *Purbeck*; certainly without intimating any disapprobation of the opinion which had been delivered at the trial, but insisting upon it in support of his argument. His lordship added that the point was new to him when it occurred at the trial; but he then thought it very unreasonable, that after a party had been led to incur expence in consequence of having obtained a licence from another to do an act, and that the licence had been acted upon, that other should be permitted to recal his licence and treat the first as a trespasser for having done that very act. That he had afterwards looked into the books upon this point, and found himself justified by the case of *Web v. Paternoster*, (best reported in *Palmer* 71, but reported also in other books) (a) where *Haughton J.* lays down the rule, that a licence executed is not countermandable; but only when it is executory. And here the licence was executed.

Wigley thereupon waved his motion.

(a) *Poph.* 151. 2 *Roll. Rep.* 143. 152.

1807.

WINTER
against
BROCKWELL.

BOOT *against* WILSON and Another.

[311]
Tuesday,
April 21st.

THE plaintiff declared in assumpsit; for that whereas on the 26th of *November* 1801, in consideration that the defendants had become and were tenants to the plaintiff of a certain messuage in *Piccadilly*, under a yearly rent of 160*l.*, the defendants promised the plaintiff that they would during the continuance of the said tenancy pay the said yearly rent. And then he averred, that the defendants were and continued tenants as aforesaid &c. from the time of making the said promise hitherto; but that the defendants did not during the continuance of the said tenancy pay the plaintiff the said yearly rent; but on the 29th of *September* 1803, during the continuance of the te-

Assumpsit lies against a lessee from year to year upon his agreement to pay rent during the tenancy; notwithstanding his bankruptcy, and the occupation of his assignees during part of the time

for which the rent accrued; which were pleaded in bar. *Qu.* whether a special plea in bar stating no facts but what might have been proved under the general issue, but leaving other facts unanswered which the general plea would have put in issue, be good,

nancy,

1807.

—
 BOOT
against
 WILSON
 and Another.

[312]

nancy, 80*l.* of the rent for half a year preceding was in arrear and unpaid; contrary to their said promise, &c. The second was a general count for use and occupation of the messuage by the defendants, at their request, and by the sufferance and permission of the plaintiff, in consideration of which they promised, &c. The third count was for use and occupation upon a quantum meruit. Pleas, 1st, Non assumpserunt. 2dly, A general plea of bankruptcy of the defendants. 3dly, A special plea of bankruptcy. That while the defendants continued such tenants of the said messuage, &c. and before the suing out of the writ of the plaintiff, viz. on the 1st of *January* 1803, and from thence until the suing out of the commission of bankruptcy afterwards against the defendants, they were traders within the meaning of the several statutes, &c.: and so it went on to state the petitioning creditor's debt; the act of bankruptcy on the 2d of *April* 1803; the petition for and issuing of the commission on the 5th of *May*, before the said rent or money or any part thereof became due, on which the defendants were declared bankrupts on the 6th; the commissioners' assignment to *J. S.* and *G. S.* the assignees of the bankrupts on the 21st of *May*, amongst other things, of all the term, estate, and interest of the defendants in the said messuage, to hold to the said assignees from thenceforth for the residue of the term then to come and unexpired of the defendants in the premises; by virtue of which assignment all the term, estate, interest, and term of years then to come and unexpired, property, claim, and demand, of the defendants of and in the said premises, became and were vested in *J. S.* and *G. S.* as such assignees, (the said commission still remaining in full force.) And the said *J. S.* and *G. S.* as such assignees on the day and year last aforesaid, became and were, and from thence until the said rent or money in the declaration mentioned became due and owing to the plaintiff, continued to be possessed of and used and occupied the said premises, &c. The replication joined issue on the two first pleas, and demurred to the third; assigning for special causes, that it appears by the declaration that the tenancy in the first count mentioned continued until the rent claimed became due; and in the second and third counts, that the defendants are charged in respect of their occupations of the said tenements; the continuance of which tenancy and occupation are not denied in the last plea: and also for that the last plea amounts only

only to the general issue : and that it is not alleged in that plea that *J. S.* and *G. S.* (the assignees) ever entered into the said tenements by virtue of the supposed assignment : * nor is the tenancy of the defendants thereby denied. The defendant joined in demurrer.

1807.

—
 BOOT
 against
 WILSON
 and Another.
 *[313]

Wigley, in support of the demurrer. The declaration states the tenancy and occupation of the defendants to the time of bringing the action : the special plea does not deny that they continued in possession to that time, but only states that their interest in the term was assigned over to the assignees : which will not take away their liability in respect of their possession as tenants ; especially as part of the rent accrued before the 5th of *May*, when the commission issued. And though the plea states an occupation of the premises by the assignees from the 21st of *May* ; yet that is not inconsistent with the declaration : for there may have been a joint occupation by them and the defendants. At any rate, however, the plea is bad : for either it is no answer in point of law to the action ; or if it amount to any thing, it is a denial that the defendants were tenants or occupiers of the premises ; and therefore amounting only to the general issue, is bad on demurrer (*a*).

Lord ELLENBOROUGH C. J. then called on the defendant's counsel to answer the objection, that the plea either denied the occupation of the defendants as tenants, and then it was bad on the demurrer, as amounting only to the general issue ; or it did not ; and then it was bad, as being no answer in law to the declaration.

Puller, *contra*, then argued, that the effect of the special plea was to narrow the issue to be tried, making it less than the general issue ; though he admitted that all the facts pleaded might have been given in evidence under the general issue. The plea admitted the occupation by the defendants ; but brought before the Court the question of their liability in consequence of their bankruptcy, and the assignment of all their estate and interest in the premises by the commissioners before the rent became due. The reason therefore why a special plea amounting to the general issue is demurrable, namely, because it merely tends to lengthen the record (*b*), without cause, does

[314]

(a) 10 *Rep.* 95.(b) *Warner v. Wainsford*, *Hob.* 127.

1807:
 —
 BOOT
 against
 WILSON
 and Another.

not apply. The principal question meant to be raised was, whether such a plea were not a good answer to an action of assumpsit for use and occupation. In *Mils v. Auriol* (a) indeed it was holden that the bankruptcy of the tenant was not pleadable in bar to an action of *covenmnt*, because the covenant was personal. But in *Wadham v. Marlowe* there cited (b), it was

(a) 1 *H. Blac.* 433. and 4 *Term Rep.* 94.

(b) *M.* 25 *Geo.* 3. *B. R.* 1 *H. Blac.* 437. The following note of the judgment is more full and correct.

Mich. 25 *Geo.*
 3. *B. R.*

Debt does not lie against a bankrupt on the reddendum of a lease for rent accruing after the commissioner's assignment; the lessor's assent to such assignment being virtually included in the act of parliament authorizing the assignment of the bankrupt's estate.

Wadham against Marlowe.

DEBT on an indenture, whereby the plaintiff leased the premises to the defendant at 75*l.* per annum, payable quarterly. This action was for 112*l.* 10*s.* for one and a half year's rent due at *Christmas* 1782, when the term expired. The defendant pleaded, 1st, non est factum; 2dly, as to 18*l.* 15*s.*, being the rent due for the quarter ending at *Michaelmas* 1781, he pleaded generally, that he became bankrupt on the 15th of *December* 1781, and that the said 18*l.* 15*s.*, became due before the bankruptcy. 3dly, as to 93*l.* 15*s.* residue of the said 112*l.* 10*s.*, he pleaded bankruptcy, specially, setting out the trading, petitioning creditor's debt, act of bankruptcy, and assignment by the commissioners to the assignee; by virtue of which the said *C. M.* (the assignee) before the said sum of 93*l.* 5*s.* or any part thereof became due, viz. on the 18th of *December* 1781, entered into the said demised premises, and was possessed thereof for, and during, and until the expiration of the said term. The plea then stated the other proceedings and the certificate. The plaintiff took issue on the non est factum; and on the second plea entered a noli prosequi, as to the 18*l.* 15*s.*; and demurred generally to the 3d plea. The Court took time to advise; and on the 19th of *November* the following judgment was given.

Lord MANSFIELD C. J. This case of *Wadham* and *Marlowe* is an action of debt for rent upon a lease for years made by the plaintiff to the defendant. The defendant pleads that he was a trader, and that before the rent became due he committed an act of bankruptcy; that a commission of bankruptcy issued against him, and he was declared a bankrupt; and that the commissioners assigned his effects to *C. M.* who, before the rent became due, entered on the premises; that the plaintiff had notice of all this; and that the defendant has conformed to the several statutes respecting bankrupts. To this plea there is a general demurrer; and two points have been argued at the bar upon the part of the plaintiff: First, that if there had been no bankruptcy in

was holden to be a bar to *debt* (a) for rent ; in lieu of which the action of assumpsit for use and occupation has been introduced. And if this action lie, the consequence* will be that there must be

1807.

—
 Boot
 against
 WILSON
 and Another.
 *[316]

(a) It appears by the MS. report here stated that the whole rent accrued after the bankruptcy.

in the case, but the defendant had assigned the lease to a third person, yet he would have been answerable in debt for the rent ; unless the plaintiff had accepted rent of the assignee. Secondly, that a commission of bankrupt and an assignment under it, being founded upon an act done by the defendant himself, viz. an act of bankruptcy, should operate only as an assignment made by the defendant ; and therefore he is still liable to an action of debt for the rent ; the plea not having stated that the plaintiff accepted any rent from the assignee. As to the first point, we do not think that it is necessary there should be an actual acceptance of rent from the assignee by the lessor, to discharge the original lessee from the action of debt, which he is liable to upon the reddendum of the lease ; but any assent upon the part of the lessor to the assignee would have the same effect. The action of debt is founded, not simply upon the demise, but on the subsequent enjoyment ; and it is not necessary in such action to state the deed at all. This point was much discussed and considered in the case of *Warner v. Corsett*, 2 *Ld. Raym.* 1500 ; where it was agreed that *nil debet* was a good plea in an action of debt for rent ; because the specialty was only an inducement to the action, and the plaintiff need not set out the indenture. What should be an enjoyment by the lessee is very much a question of law. A lessee cannot by his own act, without the assent of the lessor, destroy the tenancy ; and therefore, until such assent is given, the lessor may avow upon the lessee as his tenant, notwithstanding an assignment has been made, and the assignee is actually in possession of the land. Upon such an avowry evidence of enjoyment by the assignee, though not accepted tenant by the landlord, would be proof of enjoyment by the lessee. For the defendant it was insisted, that notice alone to the landlord of the assignment was sufficient to discharge the lessee from an action of debt. But in our judgment none of the cases cited will warrant this position. In 1 *Brownlow* 20. and *Cro. Jac.* 334. acceptance of rent from the assignee is stated ; and in 1 *Siders.* 447. (which is a very short incorrect note) it must be understood that there was an assignment, an acceptance of rent, or an assent to the assignment by the lessor. And in 2 *Saund.* 181., which was an action of debt against an assignee before acceptance,

Vi. Co. Lit. 303.

1807.
 —
 BOOT
 against
 WILSON
 and Another.

be an apportionment of the rent; for it was determined in *Naish v. Tatlock* and others (a), that assumpsit for use and occupation would not lie against the assignees to recover any portion

(a) 2 H. Blac. 319.

*[317]

ance, it was held that the lessor might sue either the lessee or his assignee. In the present case neither acceptance of rent, nor any assent by the landlord to the assignment, is stated in the plea; and therefore if the assignment under the commission has no other effect than an assignment by the lessee himself, we are all of opinion that the defendant will be liable to the rent in this action.

This brings the case to the true question, viz. what is the effect of the assignment under the commission of bankruptcy? Only two cases have been cited applicable to this point: for *Aylett* and *James* in *C. B. 22 Geo. 3.* is very distinguishable from the present in the pleadings, as well as on the question before the Court. The two cases are *Mayor v. Steward*, in 4 *Burrow's Rep.* 2439. and *Cantril v. Graham, Barnes* 69. The case of *Mayor v. Steward* was determined upon a different ground; namely, that the covenant upon which the action was brought was a distinct and independent covenant, and not a covenant which run with the land. But a strong, though an obiter, opinion was delivered by Mr. Justice *Yates* upon this point, who said that as the commission and the proceedings under it had dispossessed the bankrupt of the whole estate, and rendered him absolutely incapable of performing the covenant, it would be a hardship if he should remain still liable to it, when he is disabled by the act of parliament from performing it. The Court afterwards adopted that opinion, and said that in a case between lessor and lessee it might have seemed hard to leave the lessee liable to covenants when an act of law had divested him of the emoluments and vested them in his creditors. In *Cantril v. Graham* the court made that direct determination upon the point in the manuscript note from whence I shall cite it. The case is called *Funtur v. Graham*; and there it is said that Serjt. *Skynner* moved that the defendant might be discharged upon common bail. It appeared that the defendant in 1727, had taken a house by lease from the plaintiff *Funtur* for 9 years, with the usual covenants. After three years, he left it, and one *Lukin* lived in it, who paid rent to *Funtur*. That in 1733 the defendant became a bankrupt, and his certificate was allowed and confirmed; and this action was brought against the defendant for the rent of the two last years of the term which had accrued since the allowance of the certificate. The Court said that by the bankruptcy the lease became vested in the commissioners

portion of the rent accruing during the bankrupt's occupation.

1807.

—
BOOT
against
WILSON
and Another.
*[318]

*Lord ELLENBOROUGH C. J. The case of *Wadham v. Marlow* only decided that the action of *debt* on the *reddendum* would not lie against the lessee, for rent accruing after his bankruptcy, when he had ceased to occupy the premises, and the assignee was in possession under the commissioners assignment. But in *Mills v. Auriol*, it was determined that the bankrupt lessee, though out of possession, was still liable upon his *covenant* to pay the rent. Then here the plaintiff declares upon an agreement made by the defendant to pay the rent during the continuance of the tenancy; and if bankruptcy cannot be pleaded to an action on his *covenant*, why should it be an answer to this action on the defendant's *agreement* to pay the rent.

sioners and was by them assigned to the assignees; so that from that time the defendant ceased to be tenant of the premises; and therefore he could not be chargeable for the rent incurred afterwards: and the defendant was discharged upon common bail. The counsel for the plaintiff endeavoured to impeach the authority of this case, by saying it was only upon a motion to discharge the defendant upon filing common bail; and seemed to suppose that the Court might do that upon account of the hardship of the case, without much regard to what the strict law was. But at that time the Court would not against a positive affidavit of debt have discharged the defendant upon common bail, unless they had thought that the law was clearly with him. And it is manifest from the words in which the judgment was given that it was founded wholly on the strict law of the case, and not upon any circumstances to govern the discretion of the Court. Legal reason is strong with the determination; for the estate is transferred and vested in the assignees by virtue of the acts of parliament, respecting bankrupts: every man's assent is virtually included in an act of parliament, and therefore it is equivalent to an express assent. It was admitted on the part of the plaintiff, that if the estate were divested out of the lessee purely by an act of law, without any fault of his, he would be discharged. We think this case must be so considered, for though the commission is founded on an act originally done by the defendant, viz., an act of bankruptcy; yet the commissioners' assignment by virtue of the act of parliament is the actual and immediate cause of divesting the estate out of the bankrupt; and in jure non remota sed proxima causa spectatur. We are therefore all of opinion that there must be judgment for the defendant.

1807.

—
 BOOT
against
 WILSON
 and Another.

There is no distinction in this respect between an agreement and a covenant, which is an agreement under seal, except as to the form of the remedy upon it. The case of *Mills v. Auriol*, to which this is perfectly analogous, did not turn on any particular effect of a covenant *under seal*, but on its being the personal agreement of the parties. The landlord has nothing to do in this case with the question of apportionment of the rent: for he proceeds against the parties with whom he made the agreement which has been broken. We say nothing therefore of his right to recover against the assignees.

The other Judges concurring;

Judgment for the Plaintiff (a).

(a) Vide *Bull v. Sibbs*, 8 *Term Rep.* 327.

[319]

Tuesday,
 April 21st.

BATTYE *against* GRESLEY and five Others.

1. Under the
 stat. 1 *Jac.* 1.
c. 15. *s.* 10.
 and 11. it is
 not necessary
 upon sum-
 moning a wit-
 ness before
 commission-
 ers of bank-
 rupt to be

examined touching the bankrupt's effects, to tender him the expences of his journey beforehand: though if he be in fact without the means of taking the journey, it may be an excuse for not obeying the summons: and consequently a warrant issued by the commissioners on account of the non-attendance of such witness, without lawful impediment, authorising his arrest for the purpose of examination, is legal.

2. It lies on the party so summoned, having a lawful excuse for not attending, to prove the fact in an action of trespass and false imprisonment, brought by him for such arrest; admitting that an inability to bear the expence of the journey is a lawful impediment.

3. Such warrant for the arrest of the witness, in order to examine him, may issue after his disobedience to the *first* summons.

4. The propriety of granting the warrant, being an act of discretion, must be determined upon by the commissioners acting together at the time. And their order to their officer to make out such warrant must be taken to include their direction as to the persons to whom it is to be directed; but the mere act of signing the names of the commissioners to the warrant may be done by them separately.

wrong

wrong, and without the cause alleged. At the trial at *Lancaster* Summer assizes 1805, before *Sutton B.* a verdict was found for the plaintiff for 150*l.* damages, which was afterwards agreed to be made subject to the opinion of this Court on a case stating in substance; that *John Savage*, a trader, became a bankrupt, and a commission, dated the 12th of *January* 1805, duly issued against him, directed to the defendants *Gresley*, *Heyrick* and *Dalby*, and two other commissioners; giving the usual powers to them, or any four, or three of them to execute the same; under which *Savage* was duly declared a bankrupt. That at the second meeting of the commissioners at *Leicester* on the 5th of *February* 1805, at which the said three defendants named were present; it being stated to them by the bankrupt, on oath, that the plaintiff had in his hands a considerable part of the bankrupt's property; they issued their summons for the plaintiff to attend them at their third meeting at *Leicester* on the 5th of *March* 1805, to be examined: in which summons (in the usual form) they required every one to whom their warrant was directed personally to appear before them, the major part of the commissioners, on *Tuesday* the 5th of *March* next, at 11th o'clock in the forenoon, at the *Blue Bell* Inn in *Leicester*, to be examined by them, the major part of the said commissioners, by virtue of the commission and the several statutes, &c. (dated) the 5th of *February* 1805. The summons was transmitted by the solicitor under the commission to Messrs. *Foulkes* and *Higson*, attornies at *Manchester*, and was inclosed in the following letter directed to them. "*Leicester*, 27th *February* 1805, "*Gent.* On the other side I send you a summons, which you "will get copied and served upon Mr. *Battye*, and return me "an affidavit of the service. I do not think it necessary to give "Mr. *Battye* conduct-money: we know that he has a valuable "balance in his hands; and the commissioners will decide on "his examination how much of that balance he may deserve "to retain," &c. (signed) "*N. Pilkington.*" The summons was served by their clerk on the plaintiff, on the 28th of *February* 1805; but no money was then given or tendered to him to defray his expences. The plaintiff, between the 28th of *February* and the 5th of *March*, called repeatedly on Messrs. *Foulkes* and *Higson*, and expressed great anxiety to attend the commissioners at the intended meeting; but stated that he had no

1807.

BATTYE
against
GRESLEY
and Others.

[320]

1807.

BATTYE
against
GRESLEY
and Others.
*[321]

means to defray his travelling expences, and offered to go if they would give him sufficient money to carry him to *Leicester*. But Messrs. *Foulkes* and *Higson* refused to give him any money; saying that their orders were to give him none. On the 5th of *March* 1805 the third meeting of the commissioners was held at *Leicester*, and the said three defendants attended, and waited for the plaintiff till 12 o'clock at night but he did not attend: whereupon the said defendants, as such commissioners, directed the solicitor under the commission to draw up a warrant to be signed by them, for arresting the plaintiff and bringing him before them at their next meeting, to be held at *Leicester* on the 19th of *April* 1805, to be examined. On the 12th of *March*, Mr. *Pilkinton* received the following letter from the plaintiff, and transmitted the same to Mr. *Gresley* one of the defendants, together with the warrant, which was then unsigned by any of the said three defendants. " Mr. *Pilkinton*, Attorney, *Leices-*
" *ter*—I waited last night until the moment of the coach going
" off for some money from Mr. *Foulkes*, to whom I explained
" the necessity of my presence not only to the benefit of *Savage's*
" estate, but to clear myself from any imputation of having
" acted unjustly on that business: but as I could not obtain
" even money to pay my coach fare, I was obliged much
" against my will, not to obey your summons," &c. signed,
" *T. Battye*, *Manchester*, 5th *March* 1805." The warrant to-
gether with the plaintiff's letter, was returned to Mr. *Pilkinton*
by Mr. *Gresley*, he having affixed his signature thereto. That the
said warrant was signed by the said three defendants at separate
places, and not at any meeting held by them as commissioners.
The following is a copy of the warrant. " Whereas his Ma-
jesty's Commission under the Great Seal of *G. B.* bearing date
at *Westminster* the 12th of *January* last past, grounded on the
several statutes made and now in force concerning bankrupts,
hath been awarded and issued against *John Savage* of *Manches-*
ter, &c. hosier, dealer, and chapman, directed to us whose
names are hereunto subscribed and seals affixed, and to *J. J.*
and *M. P.* And whereas we the undersigned *R. Gresley* and
W. Heyrick, together with the said *M. P.*, being the major
part of the commissioners in the said commission named, one
whereof is of the quorum, did duly declare the said *John Sa-*
vage a bankrupt: and whereas we the undersigned *R. Gresley*,
W. Hey-

[322]

1807.

BATTYE
against
GRESLEY
and Others.

W. Heyrick, and *H. Dalby*, did on the 5th of *February* last past issue our summons directed to *Mr. T. Battye* of *Manchester* aforesaid, requiring that the said *T. B.* personally to be and appear before us the major part of the said commissioners on *Tuesday* the 5th of this instant *March*, at 11 of the clock in the forenoon of the same day, at the *Blue Bell* Inn in *Leicester*, then and there to be examined by us the major part of the said commissioners, by virtue of the said commission and the several statutes therein mentioned: And whereas good and sufficient proof upon oath was exhibited to us, that our said summons was duly served upon the said *T. Battye*: yet the said *T. Battye* did not come before the major part of the commissioners in the said commission named, at the time and place before mentioned, pursuant to our said summons; but without having any lawful impediment to his coming did wholly make a default, in contempt of the said statutes and also of the said commissioners, and of the authorities to us given: these are therefore to require and authorize you and every of you, to whom this our warrant is directed, to apprehend and arrest the said *Thomas Battye*, and to bring him the said *T. Battye* before the major part of the said commissioners in the said commission named, at the *Bell* Inn in *Leicester*, on *Friday* the 19th of *April* next, at 10 o'clock in the forenoon of that day, in order to be examined by the major part of the said commissioners in the said commission named, by virtue of the said commission, and according to the intent of the several statutes made and now in force concerning bankrupts: and for your so doing this shall be your sufficient warrant. Given under our hands and seals this 6th day of *March* 1805, *R. Gresley*, *W. Heyrick*, *H. Dalby*. (directed) To *James Staples* our messenger, and to his assistant, and to all mayors, bailiffs, constables, headboroughs, and all other his majesty's loving subjects, whom we require to be aiding and assisting in the execution of this our warrant as occasion shall require." The warrant was delivered to the defendant *Staples*, the messenger to the said commissions, to be executed: and he by virtue thereof, with the aid of the other two defendants, *Nadin* and *Taylor*, who are police officers at *Manchester*, on the 17th of *April* 1805 arrested the plaintiff at *Manchester*, and brought him in custody before the said commissioners at their next meeting at *Leicester*: at which meeting the

[323]

1807.

BATTYE
against
GRESLEY
and Others.

plaintiff was examined before the said commissioners, and discharged, and his expences allowed him. The question was, whether the plaintiff were entitled to recover?

Littledale, for the plaintiff, contended that the summons was inoperative for want of a tender to the plaintiff of the reasonable expences of his journey, and that he was not bound to go, without such tender; by analogy to the case of a witness subpoenaed to attend a trial, against whom the Court will not grant an attachment for disobedience of it, if there were no tender of the witness's expences of attending the trial (a). [Lawrence J. intimated that the necessity of a previous tender of the expences in that case was derived from the particular wording of the stat. 5 *Eliz. c. 9. (b)*] The stat. 1 *Jac. 1. c. 15. (c)*,

[324]

(a) Vide 2 *Tidd's Practice*, 721. *ch. 35*.

(b) The 12th sect. provides, "that if any person upon whom process, &c. shall be served to testify or depose concerning any cause &c. and having tendered unto him, according to his countenance or calling, such reasonable sums of money for his costs and charges, as having regard to the distance of the place is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary; that then the party making default to lose 10*l.*" &c.

(c) Sect. 10. reciting that by the stat. 13 *Eliz. c. 7.* the commissioners have power to send for such persons as the creditors suspect to detain any of the bankrupt's property, to be examined by the commissioners, but have not good remedy to compel their appearance or examination; enacts that if any, supposed to have any part of the goods, &c. of the bankrupt, "shall after lawful warning to the said person given to come before the said commissioners, &c. to be examined, &c. refuse to come, &c. having no lawful impediment, such as shall be admitted and allowed of by the said commissioners, and which shall be then signified or made known to the said commissioners at the time of their assembly, &c. then it shall be lawful for the said commissioners, &c. to direct their warrants to such persons as to them shall be thought meet, to arrest such person as shall refuse to come, &c. and to bring him before the said commissioners to be examined, &c. and upon his refusal to come, or to be examined, to commit him to prison, &c. until he shall submit himself, &c." Then *s. 11.* provides "that such witnesses as shall be so sent for shall have such costs and charges as the commissioners in their discretion shall think fit."

which

which gives authority to the commissioners of bankrupts to summon witnesses, to be examined concerning the bankrupt's estate, also directs that the witnesses shall have their costs and charges: and though silent as to the time; yet the act ought to have a reasonable construction. And in *Dyer v. Missing (a)*, which was an action of trespass and false imprisonment against commissioners of bankrupt for an arrest of the plaintiff under their warrant issued for a similar purpose, the special plea alleged a tender of his expences to the witness at the time of the summons.

Per Curiam. Nothing turned upon the tender in that case. The objection there was that the commissioners by their warrant committed the witness to prison, without first bringing him before them to be examined, as the act directs them to do. If when brought before them he refuses to be examined, then and not before, they may commit him. But there is nothing in the act of *Jac. 1.* which requires the expences to be tendered before hand to the witness at the time of the summons; as in the statute 5 *Elizabeth, c. 9.* Such tender is not made a condition precedent to the issuing of the warrant.

2dly, It was objected that, if the want of such tender did not make the issuing of the warrant illegal, at least it was a sufficient excuse to the party for not obeying the summons. He might not have had money enough to carry him.

Per Curiam. If he had had no money to convey himself to *Leicester*, that might have been a *lawful impediment*, within the statute; but it lay upon the plaintiff to shew an excuse for his non-attendance. Nothing, however, of that sort appears in the case; it is only stated that *he said* that he had no means of defraying his travelling expences: but it is not stated as a fact that he had none.

3dly, It was objected, that there ought to have been a second summons to the plaintiff before the issuing of the warrant. The meaning of the 10th sect. is not very distinct in this respect: the words are, that if any person, *after lawful warning* to come before the commissioners to be examined, refuse to

1807.

BATTYE
against
GRESLEY
and Others.

[325]

[326]

(a) 2 *Blac. Rep.* 1035.

1807.

BATTYE
against
GRESLEY
and Others.

come, &c. having no lawful impediment, to be allowed of by the commissioners at the time of their assembly; or that any such person, having knowledge *or warning* of any *other* assembly, shall not appear before them at such time, &c., then it may be lawful for the commissioners to commit him. If the word *or* be there taken in the disjunctive, the provisions seems to be, that if the party do not attend on the first summons, and being warned to attend *another* meeting of the commissioners, neglect that also, having no lawful impediment; then the commissioners may issue their warrant to commit him for not attending the *first* summons; which is not very intelligible. But if *or* be read *and*; then a second summons would be necessary before a commitment. The general practice has been to issue a second summons, upon the neglect of the first, before the warrant of commitment: and that is countenanced by the report of the case of *Dyer v. Missing*.

Per Curiam. The practice has arisen ex abundanti cautela; but the act does not require a second summons. It is in the disjunctive. The first branch is complete; and the next may well be taken to mean, that if a party, after having once before been summoned, and appearing, or having lawful impediment for not appearing, be summoned again and do not appear, &c. having no lawful impediment, he may be committed; as well as if he neglect to appear on the first summons, having no lawful impediment.

[327]

4thly, It was objected, that the granting of the warrant of commitment is a judicial act, and that the warrant ought therefore to have been signed by the commissioners when together, and not at different times and places: for they are to judge whether the party had a sufficient excuse; and also to whom the warrant is to be directed: and merely stating, that the commissioners when together directed the solicitor to draw up the warrant to be signed by them, is not sufficient. For even if that were to be taken as an exercise of their joint judgment as to the propriety of issuing the warrant, it does not appear that they exercised any discretion as to the person or persons to whom the warrant was to be directed,

1807.

—
BATTYE
against
GRESLEY
and Others.

[328]

LORD ELLENBOROUGH C. J. The commissioners, I admit, ought to hold counsel together (a), and agree upon the substance of the warrant, whether or not it shall issue for the arrest of the party; but here I consider that they had exercised together every material act of judgment, including the direction of the warrant. We must consider, that in directing the warrant to be made out, they gave their officer every necessary direction for that purpose, including the persons' names to whom the warrant was to be directed: so that when it came before them for their signatures, nothing else should remain to be done except the mere act of signing it and this need not be done together. Suppose each, immediately after writing his name, had left the room where they were assembled in the first instance: would that have avoided the warrant? Then why not sign it alone in any other place?

The other Judges concurring.

Judgment of Nonsuit to be entered.

Richardson was to have argued for the defendants.

(a) All acts of judgment required of two or more persons must be done together; as to examine witnesses to ground an order of removal; *Rex v. The Inhabitants of Coln St. Aldwin's*, *Burr. S. C.* 136: To ground an order of bastardy; *Billings v. Prinn and Another*, 2 *Blac. Rep.* 1017. In *The King v. Forrest and Others*, 3 *Term Rep.* 39. though it was stated that the magistrates did not sign the appointment of overseers of the poor together, yet the other facts of the case and the judgment of the Court shewed that the substantial objection was not that they were not together when the mere act of signing was done; but that they did not deliberate and concur together upon the propriety of the appointment. And such was the nature of the objection in *Rex v. The Inhabitants of Great Marlow*, 2 *East*, 244.

1807.

Tuesday,
April 21st.

SHADGETT *against* CLIPSON.

The defendant cannot justify an assault and false imprisonment of *A. B.* by shewing a latitat issued against *C. B.*, and averring, that it was issued against *A. B.* by the name of *C. B.*, and that they are one and the same person; there being no averment that *A. B.* was known as well by the name of *C. B.*

* [329]

TRESPASS for assaulting and imprisoning the plaintiff. Plea that before the time when, &c. viz. on the 25th of *June*, 46 *Geo. 3.* one *D. Allen*, sued out a writ of latitat against the plaintiff *Josiah Cordeux Shadgett*, therein called by the name of *John Shadgett*, directed to the sheriff of *London*, &c.: and so it set out the writ, authorizing the sheriff to arrest *John Shadgett*; which was indorsed for bail in 10*l.*; and averred the delivery of it to the sheriff, who thereupon before the return made his warrant under seal, &c. directed to the defendant *Clipson* and another, serjeants at mace, and thereby commanded them to take the said *Josiah Cordeux*, therein called by the name of *John Shadgett*, to answer the said *D. Allen* in the plea, &c.; which said warrant was delivered to *Clipson* to be executed, who before the return of the writ arrested the said *Josiah Cordeux* to answer, &c. which were the trespasses complained of, &c. And then it concluded with an averment that the said *Josiah Cordeux Shadgett*, and *John Shadgett* in the said writ and warrant* mentioned are one and the same person, and not other or different. To this there was a general demurrer and joinder.

Wigley, in support of the plea, said, that the demurrer was joined in this case before the determination of the Court in *Dixie v. Scholey* (a) in the last term; which he admitted to be directly in point against him. That the only other case upon the subject was *Cole v. Hindson* (b); but that was a case of process against the goods of the party by a wrong name.

Lord ELLENBOROUGH C. J. This case is exactly the same as *Dixie v. Scholey* last term; and that was exactly the same in principle as *Cole v. Hindson*. And there was the same averment

(a) I was not in Court when that case was decided; but the plea was in the same form as this: and the Court, I was informed, were clearly of opinion that it was no answer to the action, when brought immediately on the execution of the first process; whatever it might be after an opportunity of pleading in abatement had been suffered to go by, without insisting on the misnomer.

(b) 6 Term Rep. 234,

in

in both, that the process issued against the same person so mis-described. Process ought regularly to describe the party against whom it is meant to be issued; and the arrest of one person cannot be justified under a writ sued out against another.

1807.

SHADDETT
against
CLIPSON.

LAWRENCE J. In *Cole v. Hindson* Lord *Kenyon* observed, that there was no averment that the plaintiff was known as well by the one name as the other; neither is there any such averment in this case.

Per Curiam,

Judgment for the Plaintiff.

FISHER, Executrix of TOTEN, against MOWBRAY.

[330]
Tuesday,
April 21st.

TO debt on bond to the testator for 30*l.*, the defendant pleaded infancy; and the plaintiff replied the condition of the bond; whereby, after reciting that *Toten* had paid 14*l.* to the churchwarden of the parish of *St. Botolph, Aldersgate*, in consideration of his taking charge of an infant begotten by the defendant, the condition was, that if the defendant should pay to the testator, his executors, &c. 14*l.* and interest thereof at the rate of 5*l.* per cent., and 5*s.* for the stamp of the bond, it was to be void, &c.: he then pleaded that the bond was so made by the defendant to *Toten* for securing payment of the 14*l.* advanced by *Toten*, and paid and expended by him for the use of the defendant at his request; the same being paid necessarily and for the use and benefit of the defendant, and for securing the payment of interest on the 14*l.* at the rate of 5*l.* per cent. &c.; and then alleged a breach in non-payment of the principal and interest, and the 5*s.* for the stamp. To this there was a general demurrer, and joinder.

An infant can on no account bind himself in a bond with a penalty conditioned for payment of interest as well as principal.

When this case was called on, Lord *Ellenborough* C. J. asked *Clayton* Serjt., who was to support the replication, whether he had any authority to shew that a bond given by an infant, bearing interest, could be sustained: besides other difficulties in the case which he had to contend with. To which

Clayton Serjt. answered, that the whole current of authorities shewed that an infant might bind himself by single bill for necessities

[331]

1807.

—
FISHER
against
MOWBRAY.

cessaries (a): and that since the construction put upon the stat. 8 & 9 W. 3. c. 11. in *Roles v. Roleswell* (b) and *Walcot v. Goulding* (c) every bond with a penalty is no more than a single bill; and therefore an infant cannot be prejudiced by the form of the security. And if he were not liable at all for the payment of interest, that would not avoid the security altogether, but only go to the quantum of damages.

Lord ELLENBOROUGH C. J. Even if there were any foundation, as is ingeniously contended, for saying that, since the stat. of *William*, the bond in a penalty with a condition is in effect a single bill, and could be available against an infant upon the account here disclosed; still this goes beyond all the authorities in charging the infant with interest. And this objection goes, not merely to the quantum of damages, but to avoid the whole security; for the judgment must be for the sum due upon the bond, and part of that sum is due for interest, for which an infant cannot give a security.

Per Curiam, Judgment for the Defendant. (d)
Burrough was to have argued for the defendant.

(a) Vide *Russel v. Lee*, 1 *Lev.* 86.

(b) 5 *Term Rep.* 538.

(c) 8 *Term Rep.* 126.

(d) Vide *Co. Lit.* 172. a. A bill is commonly taken for a single bond without any condition. An infant may bind himself to pay for necessities, &c. but if he bind himself in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him. And in *Trueman v. Hurst*, 1 *Term Rep.* 40. it was held that assumpsit on an account stated would not lie against an infant.

1807.

The KING *against* The Inhabitants of ST. MARGARET, *Wednesday,*
Leicester. *April 22d.*

TWO justices by their order removed *Sarah* the wife of *David Billson*, and *Thomas* her infant son from *St. Margaret's* to *Keyham* in the county of *Leicester*. The sessions, on appeal quashed the order, subject to the opinion of this Court on the following case. It was proved that the derivative settlement of *D. Billson* was at *Keyham*. And the appellants then proved an indenture of apprenticeship by which *D. Billson* was bound to one *J. Hallam*, of *Ossington* parish in *Nottinghamshire*; under which *Billson* served more than 40 days in *Ossington*. The respondents, to set aside this settlement, produced the following certificate granted to *Ossington* parish:—*Nottinghamshire*, to wit. We, *John Redfern* and *Stephen Sharpe*, churchwardens and overseers of the poor of the parish of *Gotham* in the county of *Nottingham*, do hereby own and acknowledge *J. Hallam* and *Elizabeth* his wife to be our inhabitants legally settled in the parish of *Gotham* in the county of *Nottingham* aforesaid, &c. (concluding in the usual form,) dated the 26th of *June* 1775; and directed to the churchwardens and overseers of the poor of the parish of *Ossington* in the county of *Nottingham*; and it was signed and sealed by *John Redfern* and *Stephen Sharpe*, and allowed by two justices of the peace, in the usual form. It was proved that *Stephen Sharpe* and *John Redfern* were appointed the two churchwardens for *Gotham* parish for the year 1775, and that the said *Stephen Sharpe* was also appointed the sole overseer in the same year. The question reserved by the sessions was, whether the certificate were valid?

Rough (with whom was *Darell*), in support of the order of sessions, was stopped by the Court, who referred to *Rex v. Clifton* (a), as having in effect decided this question.

Vaughan Serjt., (*Balguy*, *Gurney*, and *Beauclerk* were with him) contra, admitted that that case pressed against him; but observed that it was the case of an appointment of a single overseer for a township; and he alone granted the certificate,

Where one of two churchwardens was also appointed overseer of the poor, a certificate of settlement signed by both is a nullity, and does not prevent an apprentice serving the certificated man in the certificated parish from gaining a settlement therein; for the certificate acts 8 & 9 W. 3. c. 30. requires the certificate to be under the hands and seals of the churchwardens and overseers, or the major part of them, or of the overseers where there are no churchwardens; and there must be at least two overseers at the time.

*[333]

1807.

The KING
against
The Inhabit-
ants of
ST. MARGA-
RET,
Leicester.

though there were two churchwardens for the parish at large : whereas here both the parish officers concurred : and the stat. 43 *Eliz. c. 2.* constitutes the churchwardens to be overseers. But finding the Court decidedly against them, he and the other counsel acquiesced.

Lord ELLENBOROUGH C. J. The words of the stat. 43 *Eliz. c. 2.* are that the churchwardens of every parish, and four, three, or two substantial householders there, shall be called *overseers* of the poor, and are to take charge of them. Then the certificate act, 8 & 9 *W. 3. c. 30.* requires that a certificate shall be granted under the hands and seals of the churchwardens *and* overseers of the parish, or the *major* part of *them* : how then can we say that that which is directed to be done by two overseers at least, joined to the churchwardens, or the major part of them, can be done by one overseer and one churchwarden only ; or by two churchwardens, one of whom acted in the double character of churchwarden and overseer ?

[334]

LAWRENCE J. The statute of King *William*, which must govern us in this question, has expressly given the power of granting certificates to the churchwardens and overseers jointly, or the major part of them : and in case there be no churchwardens, it gives the same power to the overseers alone, of whom there must at least be two : but in no event does it give this authority to the churchwardens without the overseers.

Per Curiam,

Order of Sessions confirmed.

Wednesday,
April 22nd.

DANIEL *against* DODD.

A defendant arrested, held to bail, and rendered, and afterwards superseded for want of being charged in execution

THE defendant was arrested for a debt at the suit of the plaintiff, and held to special bail ; and after a verdict for the plaintiff in *June* 1803, he agreed to accept from the defendant three bills of exchange as a collateral security for the damages and costs ; and it was agreed that execution should not issue until default made in payment of the bills. In *Michaelmas* cannot be held to bail again upon bills of exchange given by him before he was rendered, as a collateral security for the damages and costs recovered against him in the former action, and upon agreement for a stay of execution till default made in payment of the bills.

term

term 1803, after the bills had been accepted, the defendant's bail rendered him in their discharge to the warden of the *Fleet*. On the 14th of *February* 1804 the defendant was superseded for want of being charged in execution; and upon the 23rd of *February* last he was arrested upon the two bills. And thereupon

1807.

DANIEL
against
DODD.

Comyn moved on a former day that the defendant might be discharged on filing common bail; and cited *Hall v. Howes* (a) and *Taylor v. Wasteney*, (b) in the latter of which the defendant was arrested for 25*l.* and lay in gaol till he was superseded; after which he gave the plaintiff a note for 20*l.*, who held to him to bail in a fresh action upon it: but the Court discharged him on common bail; saying that it was but a further security, and did not extinguish the former cause of action. And he also referred to *Chambers v. Robinson* (c), *Crutchfield v. Seyward* (d) and *Blandford v. Foot* (e).

[335]

Reader now shewed cause, and relied upon *Collins v. Powell* (f), where a cause in which the defendant had been holden to bail, having been referred to arbitration, and the arbitrator having awarded above 10*l.* to the plaintiff, the defendant was again held to bail in an action on the award; the Court saying that it was an entire new cause of action; and distinguishing it from the common case of an action on a judgment.

Lord ELLENBOROUGH C. J. said, that the award in that case might have been pleaded in bar of the original cause of action; but here the giving the bills could not have been so pleaded in bar: they did not give a *new* so much as an *alternative* cause of action: they were nothing more than a further security for the same cause of action, according to the case in *Strange*, which is strongly in point; and gives a rule which is best calculated to prevent oppression.

Per Curiam,

Rule absolute.

(a) 2 *Stra.* 1039.

(b) *Ib.* 1218.

(c) 2 *Stra.* 782.

(d) 2 *Wils.* 93.

(e) *Cowp.* 73.

(f) 2 *Term Rep.* 756.

1807.

*Thursday,
April 23d.*GRAY *against* COOK.

A market gardener who rented a stand with a shed over it in *Fleet market*, at an annual rent; which he occupied three times a week on market-days till 10 o'clock in the morning; after which and on all other days, it was occupied by others; does not keep a stand within the meaning of the *London Court of Requests act 39 & 40 G. 3. c. 104.* so as to be privileged to be sued there for a debt under 5*l.*

THE plaintiff having recovered less than 5*l.* in an action brought in this court against the defendant, a market gardener, living at *Bermondsey* in *Surry*, the latter obtained a rule nisi in *Hilary* term last for entering a suggestion upon the roll under the statutes 3 *Jac.* 1. c. 15. and 39 & 40 *Geo.* 3. c. 104. (local acts), that the original cause of action did not exceed 5*l.*, and that the same was recoverable in the *London Court of Requests*: which application was grounded on an affidavit of the defendant's occupation of certain market stands (as they are usually called) in *Fleet-market*, which he held under the corporation of *London* at an annual rent. It appeared, however, upon shewing cause in the same term that these stands were only used by the defendant on market days, three times a week, till a certain hour in the morning; and that after that hour on those days, and at all times on other days, these stands were open to other persons: but it not distinctly appearing what description of stands these were, and how occupied, the *Court* directed the case to stand over till this term for a further affidavit of these facts: expressing their clear opinion to be, that if the party had no permanent occupation of the stand, but that it was occupied at other times by other persons; this was not such a "keeping of a stand" as was within the meaning of the act of parliament. It now appeared by an additional affidavit, that the defendant rented six garden stands in *Fleet-market* from the corporation of *London*, under an agreement with the clerk of the market, at an annual rent, with a stipulation for three months' notice to quit on either side. That these stands are about six feet square, with a roof over them, but open at the sides, and the goods are pitched on the ground. That the market days for green grocery are three times a week, during the season; and the defendant on those days occupies the stands, till about 10 o'clock in the morning, at which time all carts and waggons are directed to be cleared away; and after that time the stands are occupied by other persons, as they are on other days of the week than the green market days. It also appeared that the plaintiff

plaintiff knew of the defendant's keeping these stands in this manner before the action was brought.

The Attorney-General and *Gurney* shewed cause against the rule; and *Marryat* was heard in support of it.

LORD ELLENBOROUGH C. J. The act of the 39 & 40 G. 3. goes far enough as it is, and we must not carry it to a more extravagant length by construction. Having begun with providing for the fair and obvious cases of debtors inhabiting and residing within the city, it contemplated also the case of those who were substantially carrying on their business there in the day-time, though they might sleep elsewhere at night. It therefore extended the privilege of being sued in the Court of Requests to those who kept even stands and sheds for the sale of their goods all the day long; where those who had business to transact with, or demands to make upon, them might know where to find them at all reasonable hours. But this defendant does not keep a stand for the whole day. After 10 o'clock in the morning he is no longer to be found there; but others occupy his place. I do not object to this keeping, as of a *shed*, but to the *keeping* itself. He has too short an enjoyment of the stand to come within the fair meaning of the statute as one *keeping* a stand. It meant to include only persons virtually domiciled there during the day; though not having the convenience of sleeping there. It would be giving a dangerous latitude of interpretation to the act, if such a case as this were held to be within it.

GROSE J. This is not a *keeping* of a stand within the act; the meaning of which was to avoid unnecessary expence and vexation, by obliging creditors who sued for small sums to bring their action within the local jurisdiction where the defendants resided or generally carried on their business. As in the instance of cobblers, who have their regular stands in the town where they work all day at their employment, though they sleep elsewhere at night. But that does not apply to the situation of the defendant.

LAWRENCE J. The construction of the act contended for would be very inconvenient for debtors themselves; for they may be warned to appear to the suit by leaving the notice or summons at the stand which they keep; but a defendant would have but little chance of seeing a notice left at such a stand as

1807.

 GRAY
 against
 COOK.

[338]

1807.

GRAY
against
COOK.

[339]

this is described to be; which is occupied the greater part of every market day, and the whole of every other day, by other persons.

LE BLANC J. The *keeping* mentioned in the statute must mean at least such a permanent keeping as the nature of the stand or other subject matter will reasonably admit of; and can never apply to the case of a man who is away from the stand the greater part of the week, and the greater part of any day in the week.

Rule discharged.

Friday,
April 24th.

WEST and Another, Executors of MOORE, against
MOORE.

The devisor having devised certain estates to A. in fee; and to his executors "all his money," &c. stock upon his farm with the implements of husbandry, and all other his personal estate of what nature or kind soever, in trust to pay debts and legacies, &c.: held that the devise of the stock upon his farm carried the standing crops of corn growing there at the time of his death from the devisee of the land to the executors; although there were assets sufficient to pay all the debts and legacies without that aid.

THE plaintiffs brought an action for money had and received by the defendant to their use as executors, in order to try their title to standing corn growing on the testator's premises at the time of his death, claimed by them under the will of the testator, against the defendant the devisee of the real estate. The plaintiffs were nonsuited at the trial before *Le Blanc J.* at the last summer assizes at *Worcester*, subject to the opinion of the Court on this case. The testator, *James Moore*, by his will dated the 28th of *March* 1801, after devising several estates to the defendant in tail, devised as follows: "Also I give and devise unto my said cousin *Edward Moore* aforesaid (the defendant) all those my several estates situate in the parishes of *Great Shelsley* and *Martley* in the county of *Worcester*, and now in my own occupation, and in the occupations of my respective tenants *J. B.*, *E. S.*, and *J. M.*, to hold to him, his heirs and assigns for ever." The testator then devised several other estates to different persons: and after devising to the plaintiffs (naming them as his executors) certain freehold estates therein described, and all other his freehold, leasehold or copyhold estates not thereinbefore disposed of, in trust to sell,

and

1807.

West
and Another
against
MOORE.
*[340]

and apply the monies arising from such sale in the discharge of his *debts, funeral expences, and legacies ; he proceeded as follows : " And also I give and bequeath unto my said executors " all my monies, and securities for money, household goods, " furniture, plate, china, linen, *and stock upon my farm*, with " the implements of husbandry, *and all other my personal estate* " *of what nature or kind soever*, or wheresoever ; in trust, to sell " and dispose of the same, and to apply the monies arising " therefrom to the payment of my just debts, funeral expences, " and the expences of proving and executing this my will, and " also in the discharge of the respective legacies hereinafter by " me given and bequeathed." The testator then gave several legacies and added, " And my mind and will is, that the after- " mentioned legacies shall be paid, as soon after my decease as " my executors can with propriety sell, dispose of, and convert " into money, the real and personal estates left to them in trust " for that purpose. And in case the monies arising from the " sale of my said estates, left in trust to be sold as aforesaid, " shall amount to more than will pay my just debts and lega- " cies, then I give the surplus or residuum unto my executors " hereinafter named, to pay and apply the same unto such per- " son or persons as I shall hereafter appoint under my hand " and seal, duly executed, by way of codicil to this my will." The testator died the 27th *July* 1805, seised in fee of the several estates devised by him, and not having made any codicil to his will, or otherwise altered it. Immediately upon his death the defendant entered into possession of the several estates at *Great Shelsley* and *Hartley* so devised to him. At which time there were growing upon the lands in *Great Shelsley* several crops of wheat, oats, beans, and peas, which were shortly afterwards cut and sold by him, and 231*l.* 17*s.* received by him for the same. Exclusive of that sum, there was a considerable surplus of the testator's personality, after payment of all his debts and legacies, without selling any of the real estates devised in trust to be sold to pay debts and legacies. If the Court were of opinion that the plaintiffs were entitled to recover the value of the standing crops, then a verdict was to be entered for the plaintiffs for the said sum of 231*l.* 17*s.* But if the Court were of opinion that the standing crops passed to the devisee of the land, then the nonsuit was to remain.

[341]

1807.

—
WEST
and Another
against
MOORE.

[342]

Puller, for the plaintiffs, said, that it was clear that as between the executor and the heir, if there were no devisee of the land, the executor would be entitled to the standing crops of corn (*a*), (which was not disputed: and Lord *Ellenborough* C. J. referred to *Gilb. L. of Evid.* 214, 15, as collecting the authorities, and giving the best explanation of the distinction.) The only reason why standing crops shall pass from an executor to the devisee of the land, as was held in *Spencer's* case (*b*), is upon the presumption that it was the will of the testator that he who takes the land should take the crops which belong to it, because, as it is said in *Gilbert's L. of Evidence*, 214. every man's donation shall be taken most strongly against himself. But the rule being founded in presumption, that may be rebutted as in other cases by any thing in the will which shew that the deviser meant that the executors should have the crops. And here the devise of the land to the devisee is in general terms: but to the executors he devises by express words, *the stock on his farm, and all other his personal estate of what nature or kind soever*. The mere devise of all his personalty by express words to his executors would have rebutted the presumption arising from the general devise of the land; but when coupled with the devise to them of the *stock on his farm*, the case is stronger. Again, the devise to the executors is for the payment of debts, and therefore should have the largest interpretation to increase the fund: and the ultimate sufficiency of the fund, without this aid, will not vary the construction of the words. He relied on the case of *Cox v. Godsalve* (*c*) before Lord *Holt*, as in point to shew that a devise by one of *the stock of his farm* to his executrix would carry the standing crops to her from the devisee of the land. And this is adopted in *Bull N. P.* 34.

Wigley, contrâ, endeavoured to distinguish this from *Cox v. Godsalve*; because there the devise of the stock of the farm was not to the devisor's mother, as *executrix*, but it was expressly given to her beneficially for her life, as a devisee, and not subject to the control of his other executor, during her life: she therefore stood in the most favoured situation of a devisee: but here the personal estate which the executors take is imme-

(a) *Co. Lit.* 55. b. and 3 *Atk.* 16.(b) *Winch.* 51.(c) Before *Holt* C. J. 11 *W.* 3. cited from Lord *Holt's* MS. in *Crosby v. Wadsworth*, 6 *East*, 604. note.

diately chargeable with the payment of debts, &c. The case of *Cox v. Godsalve* admits the general rule, but proceeds on the idea that the standings crop there were *expressly* devised away from the devisee of the land, by the devise to the mother of the stock of his farms. But that is a strained construction of those words, which are usually taken to mean moveable stock only. Standing corn is not seizable under a fieri facias, but only under a levam facias: it was not distrainable at common law, but is made so by statute.

1807.

WEST
and Another.
against
MOORE.

[343]

Lord ELLENBOROUGH C. J. The case of *Cox v. Godsalve* before Lord *Holt* is in terms so much the same as this, that it must conclude it; though but for that case I should have been more inclined to think that *stock on the farm* meant moveable stock. The distinction between the heir and devisee of the land in this respect is capricious enough. In the testator himself the standing corn, though part of the reality, subsists for some purposes as a chattel interest, which goes on his death to his executors as against the heir; though as against the executors it goes to the devisee of the land, who is in the place of the heir. This is founded upon a presumed intention of the devisor in favour of his devisee. But this again may be rebutted by words which shew an intent that the executor shall have it. So the matter stands upon the authorities. The only difference between the case before Lord *Holt* and the present is that there the mother, to whom the standing corn was conveyed by the devise of the stock on his farm, was not the sole executor; but if she did not by her will make a disposition for the payment of certain sums which he bequeathed, it was to go to his other executor for the same purpose: there is therefore no material distinction between the cases: and a construction having been once put upon these words, the question is now concluded.

The other Judges concurring,

A verdict was entered for the plaintiffs for 231*l.* 17*s.*

1807.

Tuesday,
April 28th.

BRADDICK *against* TOMPSON.

Partiality and improper conduct in an arbitrator, in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond conditioned for the performance of the award; but is only matter for application to the equitable jurisdiction of the Court to set aside the award. Neither can a parol agreement between the parties to wave and abandon the award be pleaded to such action.

*[345]

TO debt on bond, the defendant craved oyer of the bond and condition; which latter, reciting that differences had arisen and were depending between the plaintiff and the defendant and other underwriters on certain policies of insurance on ships and freight, in which the plaintiff was interested, and that they had agreed to refer the same to the arbitration of *J. K. and R. H.*; was, that the bond should be void if the defendant and the other underwriters did abide by and perform the award; the submission to which was made a rule of Court; and then he pleaded, 1st, *non est factum*. 2dly, that the arbitrators make *no award*. 3dly, that although the arbitrators did make and publish their award, (which was set out in the plea, and directed a certain sum to be paid by the defendant to the plaintiff, on the defendant's subscription to the policy,) yet that they did not, before making the same, appoint any time for hearing the defendant or his witnesses or proofs, touching the matters referred, or for proceeding in the reference; and that the said award was made without the arbitrators having heard or examined any witnesses or proofs, on behalf of the defendant, and without their having given him any opportunity of producing any witnesses, &c., or of examining or observing upon the plaintiff's witnesses and proofs, &c.: And that after the making of the award, and before the time appointed for the payment of the money thereby awarded to the plaintiff, and before the last day of the term next after such award made and published, the plaintiff and defendant *mutually consented* and agreed to wave, relinquish, and abandon* the said award, and all claim and benefit on either side upon or by virtue thereof, and to discharge and acquit each other from the performance of the same; and *that the said award was thereupon waved and abandoned, and the performance thereof relinquished* by the plaintiff and defendant, and that no other award concerning the same matters has been made, &c. A 4th plea stated that the award was made without hearing the defendant, or giving him an opportunity of producing his witnesses, (as before,) not stating the subsequent waver of it: and a 5th plea relied on the waver as before stated, after

1807.

BRADDICK
against
THOMPSON.

after the award was made. The plaintiff by his replication took issue on the 1st plea: and to the second, pleaded an award as set out, made within time, by which the arbitrators awarded the defendant to pay a certain sum to the plaintiff: and demurred to the 3d, 4th, and 5th pleas; stating for special causes of demurrer, that the defendant in his 3d and 5th pleas has relied on a supposed consent and agreement to wave, relinquish, and abandon the award, and has not pleaded the same to be made by any deed, or made a profert of any such deed; and in the 3d and 4th pleas has pleaded matter arising from supposed misconduct or neglect of the arbitrators to avoid the award; which it is not competent to him to plead; the same, if it existed, being matter of application to the Court to set aside the award, and not matter of plea; particularly as the defendant has not imputed fraud to the arbitrators, or shewn that he had any witnesses or proofs to produce before them; nor has alleged that he did not know of their meetings to make the award. Joinder in demurrer.

The Court, stopping *Wigley* in support of the demurrer, asked *Marryat*, who was to support the 3d plea, whether the matter therein disclosed could serve otherwise than as ground on which to have applied to the equitable jurisdiction of the Court for the purpose of setting aside the award: but suggested that it could not be pleaded in bar to the award. And *Lawrence J.* mentioned *Wills v. M'Carmick* (a); where the Court said, that the partiality of an arbitrator could not be pleaded to an action on the award.

[346]

Marryat observed, that in *Chicot v. Lequesne* (b), Lord *Hardwicke* only said, that he knew of no case of that sort; but he thought it would be very strange if there could be no defence at common law against an action upon a corrupt award. And he argued, that an award made without hearing one of the parties was no award.

The Court however being strongly against him on this point; he next relied on the waver and relinquishment of the award by the parties, or as upon an accord and satisfaction. But all the Court were satisfied, that the defendant could not plead a collateral agreement by parol to invalidate a claim arising upon

(a) 2 *Wils.* 148.(b) 2 *Ves.* 315.

1807.

BRADDICK
against
THOMPSON.

deed (a). That his only remedy was by bringing a cross action upon the agreement against the plaintiff, for suing upon the bond, in breach of such agreement; for it is not even pleaded as accord and satisfaction; but only as an agreement *to wave*, without any act done; which is mere figurative language. On the first ground Lord *Ellenborough* C. J. added, that it was not inconsistent with the facts admitted by the demurrer that the parties might have delivered in their statements in writing, by consent, to the arbitrator, who might have decided upon them. But supposing that case were excluded, how could the injustice of an arbitrator be pleaded against one of the parties, without at least implicating him in that misconduct; which was not attempted to be done by this plea. And still the defendant could not get rid of the award, unless by shewing that the arbitrator's not hearing him made it no award. But his Lordship suggested that the defendant might not be without remedy, if a proper case were laid by affidavit before the Court, upon a motion for discharging so much of the rule for making the submission to the award a rule of Court as restrained the defendant from filing a bill in Equity (b).

Judgment for the Plaintiff.

(a) Vide *Blake's case*, 6 Co. 43. b. *Roe v. Harrison*, 2 Term Rep. 425. and *Heard v. Wadham*, 1 East, 619.

(b) Such an application was accordingly made, and a rule nisi granted in the ensuing term; which the Court seemed disposed to have made absolute; but the plaintiff's counsel agreed to refer the matter to another arbitrator.

Tuesday,
April 28th.

HORN against HUGHES.

If a debt be reduced by part payment below 5*l.* before the action brought, the case is within the *London Court of Requests act*, 39 & 40 G. 3. c. 104.

UPON a rule for entering a suggestion on the *London Court of Requests act* 39 & 40 Geo. 3. c. 104. that the original cause of action did not exceed 5*l.*, and that the same was recoverable in that Court; it appeared that the original sum due from the defendant to the plaintiff was 6*l.* 9*s.* but the plaintiff's witness proved that 2*l.* had been paid by the defendant

before

before the action was brought. *Marryat*, who shewed cause against the rule moved by *Wigley*, said, that *Clark v. Askew* (a) where a part payment which reduced the debt below 40s. before * the action brought was held to bring the case within the *Southwark* Court of Requests act, 22 *Geo. 2. c. 47.* turned upon the wording of that act, which was different from the *London* act: which says, (s. 12.) "that if any action shall be commenced in any other Court than the said Court of Requests for any debt not exceeding 5*l.* &c. then the plaintiff shall not by reason of any verdict for him be entitled to any costs," &c. And here the action was commenced for more than 5*l.*; and it could not be told what the balance might be before the trial.

1807.

HORN
against
HUGHES.
*[348]

Lord ELLENBOROUGH C. J. It is unnecessary to say what we might have thought, if it had appeared that the plaintiff had a reasonable ground for bringing his action for more than 5*l.*, but that from the absence of a witness or other cause, without his default, he had failed in proving his whole demand: but here it appears that less than that sum was due at the time of bringing the action by means of a part payment of which he must have been cognizant,

Rule absolute.

(a) Ante, 28.

SEARE *against* PRENTICE.

Wednesday,
April 29th.

THIS was an action on the case brought by the plaintiff, a shoemaker, against the defendant, whom he had employed as a surgeon, for negligently, ignorantly, *and unskillfully reducing a dislocated elbow and fractured arm of the plaintiff, of which he had undertaken the cure. The cause was tried before *Heath J.* at the last assizes at *Hertford*; and a verdict having been given for the defendant under the direction of the learned Judge; that direction was now impeached, and a rule nisi for setting aside the verdict and granting a new trial was

An action on the case lies against a surgeon for gross ignorance and want of skill in his profession, as well as for negligence and carelessness, to the detriment of a patient:

though if the evidence be of negligence only; which was properly left to the jury and negatived by them; the Court will not grant a new trial because the jury were directed that want of skill alone would not sustain the action,

*[349]

moved

1807.

SEARE
against
PRENTICE.

moved for by *Gurney*, upon the ground that there was evidence laid before the jury of the *unskilful* treatment of the plaintiff by the defendant; but that they were told by the learned Judge, that unless *negligence* were proved, they could not examine into the *want of skill*: and the evidence, he now admitted, did not substantiate the charge of *negligence*, though it proved the want of skill. And he referred to *Slater v. Baker (a)*, to shew that an action lay against a surgeon for ignorance and unskilfulness in his profession: and to *Bull. N. P. 73*. where the general rule is laid down, that in all cases where a damage accrues to another by the negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie: as if a farrier kill my horse by bad medicines, or refuse to shoe, or prick him in the shoeing.

The Court granted a rule nisi. And now, upon the Judge's report being read, the case appeared to be this:

[350]

The plaintiff's brother-in-law proved, on his behalf, that on the 2d of *April* 1805 the defendant attended the plaintiff, who had fallen from a horse, and told the defendant that his arm was broken: the defendant said that he thought the arm, which was swollen; was not broken, and applied vinegar to it, and bound it with tape. That the plaintiff was under the defendant's care for ten weeks without being cured: he could not bend his arm or work at his trade. That he then applied to *Mr. Kingston*, another surgeon, and after some time could work, and put his arm to his head. On cross examination the same witness proved that the defendant was first sent for at night, and came directly; that he regularly attended the plaintiff every day but one, till the latter applied to *Mr. Pidcock*, another surgeon, who, about nine or ten days after the accident, attended and assisted with the defendant in setting the elbow. *Mr. Kingston*, the surgeon, then proved that in *July* 1805 the plaintiff was brought to him a cripple in his arm, one bone of which was broken obliquely below the elbow. That the plaintiff's arm was almost straight; he could not turn his wrist, and had no motion in the elbow. That the witness broke the callous and set it again, and made (what the witness himself described as) a very fine cure, which was spoken of about the country.

(a) 2 Wils. 359.

1807.

SEARE
against
PRENTICE.

He imputed the failure of the defendant in his attempt to cure the plaintiff to *negligence and carelessness* : an apprentice boy (he said) might have known better : that the bone might have been set within five hours after the accident ; though he admitted that the swelling, if much, must first be reduced, which might take a fortnight. And he recommended the plaintiff to bring an action. He also spoke to a conversation with the defendant ; who considered it as a very difficult dislocation to reduce ; and said that he would make a compensation to the plaintiff. The learned Judge told the jury that the gift of the action was *negligence* ; of which direct evidence might be given ; or it might be inferred by the jury, if the defendant had proceeded without any regard to the common ordinary rules of his profession. *That unskilfulness alone without negligence, would not maintain the action.* And that, he was at a loss to state to the jury what degree of skill ought to be required of a village surgeon. But that whether or not his direction were accurate in this respect, at any rate the witness *Kingston* imputed only *negligence and carelessness* to the defendant and *Pidcock*, in not discovering the fracture of the bone of the arm when they reduced the dislocated elbow ; which there was no doubt was properly reduced : and that considering all the circumstances of the case, he did not think that such gross negligence was imputable to the defendant, as to make him liable in damages to the plaintiff. The report concluded by stating that the jury found a verdict for the defendant, much to the Judge's satisfaction ; who intimated that the vaunting language of the witness *Kingston* must have diminished his credit with the jury.

[351]

Shepherd Serjt. and *Espinasse* were now to have shewn cause : but though all the Court seemed to be satisfied, as well now as when the rule was moved for, that the action well lay for unskilfulness in the profession of a surgeon : yet upon a revision of the evidence as reported, they asked of the plaintiff's counsel what evidence there was of *want of skill* in the defendant ; *Kingston*, the surgeon, only imputing to him *negligence and carelessness* : which the learned Judge had stated to be a ground of action, and had left to the jury for their consideration ; but which the jury had negatived ; as indeed the evidence well warranted them in doing.

Gurney,

1807.

SEARE
against
PRENTICE.
*[352]

Gurney, in support of the rule, said, that it was to be collected from the whole of *Kingston's* evidence that he imputed want of skill to the defendant; and that was* shewn by the expression used by him, that an apprentice boy might have known better. That so much skill at least was required of a surgeon as to be able to tell whether or not an arm was broken, or an elbow dislocated. But it was enough that the question of want of skill was wholly withdrawn from the consideration of the jury.

Lord ELLENBOROUGH C. J. The surgeon who was examined specifically imputed the failure of the cure to *negligence* and *carelessness*, whatever other expressions he may have used in the manner of giving his evidence, upon which the learned Judge has commented. Therefore, however we may differ from the learned Judge, as I certainly do, in thinking that an ordinary degree of skill is necessary for a surgeon who undertakes to perform surgical operations; which is proved by the case in *Wilson*, and indeed by all analogous authorities; in the same manner as it is necessary for every other man to have it in the course of his employment; as the farrier who undertakes to cure my horse must have common skill at least in his business, and that is implied in his undertaking; and although I am ready to admit that a surgeon would be liable for *crassa ignorantia*, and would be justly responsible in damages for having rashly adventured upon the exercise of a profession, without the ordinary qualification of skill, to the injury of a patient: yet the question did not arise upon the evidence in this case; for no want of skill was imputed to the defendant; and therefore the opinion of the learned Judge upon that point does not affect the merits of the verdict upon the evidence in the cause.

[353] The other Judges concurred; and *Grose J.* referred to 3 *Blac. Com.* (*ch. 9. p. 163, 4.*) as confirming the general doctrine.

Rule discharged.

1807.

DOE, on the Demise of M. BURROUGH and BARBARA
his Wife, against GEORGE READE.

Wednesday,
April 29th.

THIS was an ejectment brought to recover the possession of certain copyhold premises in the manor of *Damaran* and *Martin cum Tidpitt*, called *Butchers*, &c. in the county of *Wilts*, on the demises of *Burrough* and his wife, and of the husband alone, dated the 2d of *January* 1807. At the trial before *Sutton B.* at *Salisbury*, the title as to *Butchers* stood thus. A copy of the court roll was produced, dated the 24th of *October* 1735, whereby *George Reade*, the grandfather of the defendant, and of *Barbara*, the lessor, took the premises in question, to hold to him and his sons *G. G. Reade* and *W. Reade* successively during their lives and the life of the longest liver. On the 13th of *January* 1777 (*G. G. Reade* the eldest son being dead) *W. Reade*, having issue, the defendant *George Reade*, and the lessor *Barbara*, purchased by copy of that date the reversion of the said premises, on the determination of the estate of *G. Reade*, the grandfather, and of his own estate for life therein; to hold to the defendant *George*, his son, then an infant, during his natural life; and the defendant was thereupon admitted to the same. On the 19th of *January* 1786, *W. Reade* surrendered his own life estate and the reversionary estate of the defendant *George* his son, then a minor, and took another grant of the lord by copy of that date, to hold to *himself, the lessor *Barbara*, and the defendant *George* successively; and was admitted thereon. *W. Reade* continued in possession till his death on the 28th of *March* 1806, whereupon the defendant entered. The verdict was taken for the plaintiff for all the premises, with liberty, as to *Butchers*, for the defendant to move to set it aside, if the Court should be of opinion with him. Accordingly on a former day,

Burrough (and *Pell* was with him) moved for a new trial; on the ground, that the purchase of the reversionary estate by *Wm. Reade* the father, in 1777, to hold to the defendant *George*

A., a copyholder for life, remainder to *B.*, surrenders his own and *B.*'s estate, (over which latter he had no controul, and by which he let in *B.*'s remainder) and takes a new copy for the lives of himself, *C.*, and *B.*, successive; and on *A.*'s death, after 20 years had run against *B.*, *B.* enters on the possession then vacant. Held that as against *C.*, who had no possession and no title, *B.* might defend his legal title, coupled with possession, in ejectment; however 20 years adverse possession by *A.* might have barred *B.*'s possessory right, as against him; or might have disabled in ejectment.

*[354]

B. if he had continued out of possession from recovering

Reade

1807.

—
DOE
against
READE.
* [355]

Reade his son, was, according to *Dyer v. Dyer* (a), and that class of cases, an advancement of the son by the father, which gave the son the legal and beneficial interest in the premises, unless a * custom in the manor had been shewn, by which he would be taken to hold only for his father. And as no such custom was proved, the father could not surrender the legal estate of the son. But it was objected, that by the surrender of the father's life estate, the son's reversion was let in, in 1786: that after that time the father's possession was adverse to his; and that the son was barred by not having entered within 20 years after his right accrued: but during part of that time the defendant was an infant: and the father who had a life estate did not die till 1806: and the defendant was not obliged to take advantage of the father's forfeiture.

The Court said, that they supposed that the lessor of the plaintiff relied upon the surrender of the father's prior life estate, which was thereby absolutely determined, and the defendant's reversion let in immediately. But at any rate, as the defendant had taken peaceable possession of the premises on his father's

(a) In the Exchequer, Nov. 1788, MS. S. C. 1 *Watk. on Cop.* 216. and 1 *P. Wms.* 113. 5th edit. *in notis.* The authority of this case was recognized by Lord *Kenyon* in a subsequent case in *B. R. of Swift on the Demise of Farr v. Davis*, Hil. 39 *Geo.* 3. where it was held that where three lives in a copy are to take successive, and a father, who is the sole purchaser, puts in the lives of himself and his two sons, in general the sons shall take beneficially, unless it appear by any concurrent act of the father that he did not so intend it; as, in that case, by taking at the same court a licence from the lord to himself and his mother (who had her widowhood right in the copyhold) to lease for 70 years. In which case, if the father afterwards grant a lease by way of mortgage pursuant to such licence to lease, and there be a custom in the manor for the first taker to dispose of the estate as against the other lives; such custom may so far operate as to divest the legal estate of the lives in reversion and give it to the lessee. Or if there were any doubt of that; or if the licence of the lord might be construed to extend only to the first taker of the new copy *jointly* with his mother, and the first taker *alone* executed such licence after her death; yet a court of equity (even if the surviving life, (the son,) succeeded at law on his strict legal title,) would make the son, the surviving life, convey to his father's lessee, and pay all the costs in law and equity. MS.

death

death, and had both the legal and equitable title in him, they saw no objection to his retaining the possession; and therefore granted a rule to shew cause, &c.

Dampier now shewed cause, and relied on the adverse possession of the defendant's father for above 20 years, under whom the lessor *Barbara* immediately claimed; the defendant's life having been postponed to her's in the new copy taken by *Wm. Reade* in 1786: and to which alone his possession must be attributed. Then if the defendant's right of entry were ousted, as it was, so that he could not have maintained ejectment, it cannot vary the question that he got into possession after the 20 years' adverse possession had run against him, which had transferred the possessory right to the lessor.

LAWRENCE J. This reasoning might have applied, and the difficulty would have existed, if *George Reade* had been now a plaintiff instead of a defendant in ejectment; and were contending against any person who had an adverse possession against him: but what possession has *Barbara Burrough* against him? She is in effect a stranger to the estate, having no present title, and can have no right to recover in ejectment against one who is admitted to have the legal title, and is also in possession. The question might have arisen in the lifetime of *Wm. Reade*, the father, after 20 years adverse possession by him: but upon his death, there being no person in possession, there was nothing to hinder the defendant from asserting his right by entering peaceably into a vacant possession; and now he has both the legal title and the possession.

The Court all agreed, that the defendant, being lawfully in possession, might defend himself upon his title, though 20 years had run against him before he took possession: such 20 years' possession not being the possession of the lessor of the plaintiff.

Rule absolute.

1807:

DoR
against
READE.

[356]

1807.

Wednesday,
April 29th.

GOODTITLE, on the Demise of WRIGHT, against
OTWAY.

After verdict in ejectment for a messuage and tenement, the Court will give leave to enter the verdict according to the Judge's notes for the messuage only, (pending a rule to arrest the judgment), without obliging the lessor of the plaintiff to release the damages.

THIS ejectment was brought for a messuage *and tenement*; on which after verdict, it was moved to arrest the judgment for the uncertainty of the description, upon the authority of *Goodtitle v. Walton* (a), and *Doe v. Plowman* (b): and a rule nisi having been granted, it was moved by *Jekyll*, pending that rule, to enter the verdict, according to the Judge's notes, for the messuage only. *East* shewed cause against the latter rule, and cited *Wood v. Payne* (c), and *Burbury v. Yeomans* (d), to shew that the verdict could not be entered for the messuage only, unless the lessor of the plaintiff released the damages (e), which were entire, and could not be severed by the act of the Court; the plaintiff having brought the ejectment for lands as well as for a house, and the whole case having gone to the jury upon a question of heirship, and no distinct evidence given as to any messuage.

The Court however made the rule absolute for entering up the verdict for the messuage only, without obliging the lessor of the plaintiff to release the damages; which, being merely nominal in this case, they said, would follow the verdict for the messuage, in the same manner as if the question had occurred at the trial, and the verdict had in the first instance been taken for the messuage only. The other rule of course fell to the ground.

(a) 2 *Str.* 834.

(b) 1 *East*, 441.

(c) *Cro. Eliz.* 186.

(d) 1 *Sid.* 295.

(e) The costs follow the damages by the statute of *Gloucester*.

1807.

COBB *against* STOKES.*Thursday,*
April 30th.

IN debt for 50*l.* the declaration stated, that on the 25th of September 1805, it was agreed between the plaintiff and the defendant, that the defendant should take and hold a messuage, with the appurtenances, &c. at *Sydenham*, as the same were then late in the possession of one *Turner*, for one year and no longer, from the 24th of *June* then last; by virtue of which agreement the defendant entered and continued in possession until the 24th of *June* 1806, when the term ended. That the plaintiff on the 11th of *August*, whilst the defendant was in possession, gave notice and demand in writing for delivering possession to the plaintiff; but the defendant did not deliver up the possession but held over for three months. That the annual value of the messuage, &c. was 20*l.*, and the plaintiff became entitled to 10*l.* as double rent, &c. There was a second count for 20*l.* for use and occupation; and a third count for use and occupation upon a quantum meruit. The defendant pleaded nil debet; and also a set-off to the two first counts, for money paid for the plaintiff at his request to *G. W. Meriton*, then being the ground landlord of the premises, for and on account of the ground rent reserved out of the same; and for money paid; and upon an account stated. There was a similar set-off to the last count.

At the trial before the Lord Chief Baron at *Maidstone*, the plaintiff proved the agreement, as stated in the declaration, to occupy the premises for one whole year from the 24th of *June* 1805 to the 24th of *June* 1806, and no longer, at the rent of 8*s.* a year, (payable* quarterly;) and also proved a demand of possession, and notice given by him to the defendant to quit on the 11th of *August* 1806, or to pay double rent. The plaintiff's demand was reduced by a payment of 10*l.* 10*s.* by the de-

Where a demise is for a certain time, no notice to quit is necessary at or before the end of the term to put an end to the tenancy but a demand of possession and notice in writing, &c. are necessary to entitle the landlord to double rent or value; and such demand may be made for that purpose above six weeks afterwards, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy; and he will thereupon be entitled to double value as from the time of such demand, if the tenant held over: but if the rent were before reserved

quarterly, and such demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter.

* [359]

1807.
 ———
 COBB
 against
 STOKES.

defendant to *Meriton* the ground landlord, to 4*l.* 11*s.* 3*d.* (a), for which the jury gave a general verdict. The questions in this case were, whether the demise being for a year and no longer, any notice to quit were necessary at the end of the term; or whether the subsequent notice, so late after the 24th of *June* as the 11th of *August*, did not come too late; especially for the purpose of making the defendant a trespasser by relation, so as to fix him with double rent; or, if liable to pay double rent at all, whether the defendant were liable to pay it before the time of actual notice and demand of possession? The defendant had leave to move the Court to enter a verdict for him, if they should so think fit. A rule nisi was accordingly obtained for this purpose, which was supported by *Shepherd*, and *Bayley*, *Serjts.*, and opposed by *Garrow*, *Holroyd*, and *Comyn*.

[360]

It was admitted on the part of the defendant, that the demise having been specifically for one year, no previous notice was necessary to put an end to the tenancy at that period; but that the landlord might have immediately maintained an ejectment in case the tenant had then refused to quit. But it was contended, that the landlord having omitted to put an end to the tenancy at that time, and having suffered the tenant to continue so long after as the 11th of *August*, must be taken to have agreed to his continuing in possession upon the original terms, and could not entitle himself by any subsequent notice in the middle of a year to double rent: for that would be to entrap the tenant, and make him a trespasser by relation, when he had reason to consider that he was holding over with his landlord's consent. That in *Cutting v. Derby* (b) the Court considered

(a) It was thus calculated at the trial:				£.	s.	d.
One year's single rent to the 24th of <i>June</i> 1806	-	-	-	8	8	0
Double rent from the 24th of <i>June</i> to the 3d of <i>November</i> , when the writ issued	-	-	-	6	13	3
				<hr/>		
					15	1 3
Deduct for ground rent paid	-	-	-	10	10	0
				<hr/>		
Verdict taken for balance of	-	-	-	4	11	3
				<hr/>		

(b) 2 *Blac. Rep.* 1075.

1807.

COBB
against
STOKES.

it more proper for the landlord to give notice even before the expiration of the term, to prevent surprize on the tenant. That this was not a case within the stat. 4 Geo. 2. c. 28., which charged the tenant with double the yearly value in case of his *wilfully* holding over: for that was only meant to apply to cases where the holding over was plainly wrongful and without colour of title: and at any rate would only apply by the very terms of it *after the demand made, and notice in writing to deliver up possession*: whereas the plaintiff took a verdict upon a calculation for double rent as from the 24th of *June* instead of the 11th of *August*. But if he were not entitled to double rent as from the 24th of *June*, this inconsistency would follow upon the claim of it from the 11th of *August*, that the defendant must be acknowledged as tenant after the 24th of *June* when the year ended; which must be taken to be upon the terms of his former holding, which made the rent payable quarterly; and yet in the middle of a quarter he would become a trespasser: but he could not be both tenant and trespasser by implication during the same, or any part of the same period. That if the plaintiff were not entitled to any double rent, then the set-off was sufficient to cover his demand; for only a year and a quarter's rent was due before the bringing of the action, and that was covered by the 10 guineas paid for the ground-rent; and the rent being reserved quarterly, the landlord could not recover for a fraction of a quarter. But that at any rate the verdict was taken for too much.

[361]

It was admitted on the other side, that the plaintiff was only entitled to double rent from the 11th of *August*, when the notice to quit with a demand of possession was given. They insisted however at first on single rent between the 24th of *June* and the 11th of *August*; but in this they were over-ruled by the Court; who being with the plaintiff upon the other points, no further argument was had upon them.

The Court were finally of opinion, that the demise being for one year and no longer, a notice to quit was not necessary at the end of the year in order to put an end to the tenancy (a):
but

(a) See the same rule laid down by Lord Mansfield in *Messenger v. Armstrong*, 1 Term Rep. 54. and in *Right v. Darby*, ibid. 162. In the latter of which his lordship also said; "If there be a lease for a year,

1807.

COBB
against
STOKES.

[362]

but that a demand of possession was necessary in order to entitle the plaintiff to double rent or value. That such demand however need not be made for that purpose on or before the expiration of the term, but might be made afterwards; (the landlord, as Lord *Ellenborough* observed, not having in the mean time done any act to recognize the defendant as continuing to be his tenant :) and that here the plaintiff having on the 11th of *August* demanded the possession, and given notice in writing to the defendant to deliver up the premises, had complied with all which the act of the 4 *Geo. 2. c. 28.* required of him: after which the defendant must be taken to have wilfully held over; and then the statute entitled the plaintiff to the double value from that time. But they also held that if the plaintiff took his verdict for the double value from the 11th of *August*, he could not recover the single rent, as upon an implied tenancy with reference to the former holding, for the fraction of the quarter between the 24th of *June* and the 11th of *August*. The verdict therefore was directed to be altered accordingly (a); on which the rule was discharged.

(a) The plaintiff remitted 3 <i>l.</i> 1 <i>s.</i> 3 <i>d.</i> and took his ver-	£	s.	d.
dict within the mark for 1 <i>l.</i> 10 <i>s.</i> that is for one year's			
single rent to 24th of <i>June</i>	-	-	8 8 0
Double rent from 11th of <i>August</i> to 3d of <i>November</i> ,			
about	-	-	3 17 0
			12 5 0
Deduct ground rent paid			10 10 0
			<hr/> 1 15 0

and *by consent of both parties* the tenant continue in possession afterwards, the law implies a tacit renovation of the contract: they are supposed to have renewed the old agreement which was to hold for a year," &c.

1807.

HOWELL and Others *against* HARDING.Friday,
May 1st.

GURNEY, on the part of the plaintiff, had obtained a rule calling on the defendant to shew cause why 17*l.* due to the latter from the plaintiff, as costs for not proceeding to trial in this cause, pursuant to notice given at a former time, should not be deducted from 30*l.*, for which a verdict had ultimately been entered for the plaintiff* by the direction of an arbitrator to whom the cause had been referred: and that no attachment should issue against the plaintiff for the non-payment of the said 17*l.* This was moved on an affidavit that the defendant had sold off all his property, and was believed to be about to abscond; and that the plaintiff had no other means of securing himself.

Lawes opposed the rule, on behalf of the defendant's attorney, for whom he claimed a lien on these costs; and cited *Mitchell v. Oldfield* (a), *Read v. Dupper* (b), *Randle v. Fuller* (c), and other cases, to shew that the attorney has such a lien against the adverse party.

But all the Court agreed, that the attorney's lien only attaches upon the balance of the costs accruing in the same cause, which are ultimately to be paid over to the one or other party in that cause: and that the cause is not to be split, so as to give the attorney of either party a lien upon interlocutory costs, although ultimately his client should be bound to pay costs to a greater amount to the adverse party. None of the cases, they said, went this length, and it would be unjust to extend the lien so far. *Mitchell v. Oldfield* was an attempt to set off the debt and costs in *another* suit between the parties against the attorney's lien in the subsisting suit; which was not allowed. And so was *Randle v. Fuller*. That the attorney was only a representative character, and had a right to represent his client in this respect upon the general and final result of the cause: that his lien was entire, not one lien upon the costs of the declaration, another upon the costs of the plea, and so forth.

Rule absolute. (d)

(a) 4 *Term Rep.* 12.(b) 6 *Term Rep.* 361.(c) *Ib.* 456.(d) Vide *Nuney v. Modigliani*, 1 *H. Blac.* 217.

The plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause: notwithstanding the objection of the defendants' attorney on the ground of his lien, which only attaches on the general result of the cost, &c. of the cause.

*[363]

[3

1807.

Saturday,
May 2d.

OMEALY against NEWELL.

An affidavit of debt made by the plaintiff residing in a foreign country before a foreign magistrate, whose signature to the jurat and his authority in that country to administer oaths and take affidavits were verified by a proper affidavit in this country, is a sufficient foundation for a Judge's order to hold the defendant to special bail:

and this, notwithstanding the stat-
12 G. 1. c. 29. which requires an affidavit of the cause of action by the plaintiff, (by which must be under-

stood by an affidavit taken before a competent jurisdiction in this country, whereon, if false, perjury might be assigned:) for that branch of the statute is restrictive of the acts of plaintiffs only, and not of the courts. But any person making or knowingly using a false affidavit so made abroad for this purpose is guilty of a misdemeanor in attempting to pervert public justice, and is punishable by indictment.

*[365]

THE defendant, a citizen of the United States of *America*, who had come to this country, was arrested and held to bail by a Judge's order, upon an affidavit of debt for 1300*l.* contracted in *America*, sworn to by the plaintiff, another citizen of *America*, then at *Paris*, before a person of the name of *Bonomée*, who verified the affidavit in this manner; "sworn at *Paris* on (a certain day) before me, notary public, magistrate competent in this behalf, and duly authorized by the laws of *France* to administer oaths and take affidavits. (Signed) *D. F. C. Bonomée*." And the signature of *Bonomée*, and that he was a magistrate of *France* authorised to administer oaths and take affidavits, were verified by a proper affidavit sworn here. An application was made for the defendant's discharge in last *Michaelmas* term, upon the ground of the insufficiency of the affidavit to hold to bail; and the matter was debated several times; when the Court, considering the question to be of very general and extensive consequence, directed the case to be set down for argument in the peremptory paper of *Hilary* term last, upon a * rule nisi for discharging the defendant on filing common bail.

The point was then very fully debated by *Park* and *Parnther* on shewing cause against the rule, and by Sir *V. Gibbs* and *Scarlett* in support of it. Upon the principal question as to the existence and foundation of the practice before the statute 12 Geo. 1. c. 29. and its legality afterwards, there were cited *Roberts v. Slingsby* (a), *Walrond v. Van Moses* (b), *Regula Generalis* of 1654, *Rios v. Belifante* (c), *Van Morsell v. Julian* (d), *Pomp v. Ludvigson* (e). *Ex parte Worsley* (f), and *Dalmer v.*

(a) 2 *Keb.* 101.(b) 8 *Mod.* 323.(c) 2 *Stru.* 1209.(d) 1 *Wils.* 231.(e) 2 *Burr.* 655.(f) 2 *H. Blac.* 275.*Barnard*

1807.

—
 OMEALY
 against
 NEWELL.

Barnard (a). Upon a second question, which arose incidentally, and which the Court also desired to hear spoken to, how far the making or knowingly using such an affidavit, if false, was punishable, the plaintiff's counsel referred to 2 *Hawk. c. 22. s. 1. 38 & 39.* which cites *Waterer v. Freeman (b)*. Also to *Worsley v. Harrison (c)*, *Rex v. Mawbey (d)*, *Rex v. Crossley (e)*, and to 2 *East's P. C. 821.* which cites *R. v. Blackburn, M. 36 Car. 2. Trem. P. C. 101.* Upon this part of the case

Lord ELLENBOROUGH C. J. at the conclusion of the argument said, that he had not the least doubt, that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment. That the case of *The King v. Mawbey*, and others, went the whole length of that proposition. Upon the principal point, he adverted to the practice of receiving affidavits of this description for the same purpose, which had uniformly prevailed as far back as living memory could trace it, and up to the time of Lord Chief Justice *Lee*; supported as it was by the note in 8 *Mod.*: and said, that before they could consign all the courts of *Westminster-hall* to blame for so long a period, in having, as was suggested, overleaped their legitimate authority, it was their duty to examine at leisure the very basis of the practice; to see whether it might not be reconciled with the provisions of the statute of the 12 *Geo. 1. c. 29.* which, as then advised, he thought was intended only to restrain the acts of plaintiffs in holding defendants to bail, and not to fetter the discretion of the Court in this respect. That affidavits sworn before the Lord Mayor of *London* were generally received and acknowledged in foreign countries; and that he should be very sorry to find that the courts of this country were under the necessity of dealing out in future a narrower measure of justice to foreign states than those states were in the habit of administering to us.

[366]

Curia advisare vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

(a) 7 *Term Rep.* 251.(b) *Hob.* 205. 266.(c) *Dy.* 249. a. pl. 84.(d) 6 *Term Rep.* 619. 635.(e) 7 *Term Rep.* 315.

1807.

—
 OMEALY
 against
 NEWELL.

[367]

This was an application to the Court to discharge the defendant, who had been held to bail under a Judge's order, made upon an affidavit of debt sworn before one *Bonomee*, a magistrate at *Paris*: and the questions were, first, whether since the statute 12 *Geo.* 1. c. 29. a defendant could be held to special bail, except under the terms of that statute, viz. upon an affidavit of the cause of action of the plaintiff, made before a judge or commissioner of the court, and filed according to the custom of the court, and by indorsement on the writ of the amount sworn to, as required by the statute. 2dly, Whether supposing a defendant could be held to bail otherwise than under the terms prescribed by the statute, he could be so in respect of an affidavit made out of *England*: and if he might be held to bail under an affidavit made out of *England*, whether there be any difference in this respect between affidavits of debt made in *Ireland* and *Scotland*, and affidavits made in foreign parts not within his majesty's dominions. 1st, The statute 12 *Geo.* 1. c. 29, in the 1st section, generally prohibits the holding to bail in superior courts for causes of action under 10*l.*; and in inferior courts, under 40*s.* This prohibition lies to every species of holding to bail, as well by affidavit of the party, sworn as required by the statute, as otherwise. The first branch of the 1st section of the statute is therefore restrictive of the authority of the Court in this particular, as well as of the act of the plaintiff. The second branch of this 1st section appears in terms to be restrictive of the act of the plaintiff only: at least it is capable of being so construed, if the usage and practice of the Court before and since the statute should be found to accord with and warrant that construction. The provision is that in causes of action in the superior courts, not amounting to 10*l.* &c., and where *the plaintiff or plaintiffs* shall proceed by way of process against the person, "*he, she, or they* shall not arrest or cause to be arrested" the body of the defendant or defendants. And the 2d section goes on to direct the mode in which *the plaintiff* shall proceed by affidavit made and filed, and by indorsement on the writ, in order to arrest the defendant: and unless this mode be pursued, the 2d section of the act concludes with directing that "*the plaintiff or plaintiffs* shall not proceed to arrest the body of the defendant:" all along, in its terms, adverting to the arrest made under the directions of the statute, as *an arrest by the plaintiff*,

1807.

 OMEALY
 against
 NEWELL.

plaintiff, and not as one by the act of the Court. The usage of the Court anterior to the statute appears to have been, to receive affidavits sworn abroad and verified here, for the purpose of making orders thereupon to hold defendants to bail. In a note subjoined to the case of *Sir John Walrond v. Van Moses*, *Mich. 11 Geo. 1.*, being the year immediately preceding the stat. *12 Geo. 1.*, as reported in *8 Mod. 322.*, it is stated, "that the Court held that a plaintiff who was in *Holland*, might make affidavit there, and get it attested by a public notary, and that it should be admitted *as evidence* to hold the defendant to special bail here." In other words, that the Court might act upon evidence derived through the medium of an affidavit made abroad, as a sufficient foundation in point of fact whereupon to make an order for holding the defendant to bail. Of course, therefore, recognizing both the authority and the practice of the Court on this subject. The Court seems to have exercised an authority occasionally before the *12 Geo. 1.* of regulating the sum in which the party, taken upon a *capias* issued by them, should be held to bail. It was the duty of the sheriff, to have the body of the defendant at the return of the writ; and he was first *obliged* to take bail by the stat. *II 6 (a)*; but the amount in which he should require it, (not exceeding of course the amount of damages mentioned in the writ,) was left to his discretion, guided by such information as he should be able to acquire. But the Court, under whose authority the writ issued, in many cases regulated the sum for which, and the cases in which, bail should be required by its own discretion. In *Michaelmas* term 1654 the Courts of K. B. and C. B., by rules of their respective Courts made in nearly the same words, expressly regulated this subject in respect to actions of covenant, of battery, conspiracy, false imprisonment, and of slander; which latter description of action they wholly excluded from special bail; except the slander were of title, in which case it was left to the discretion of the Judges whether there should be any bail, and to what amount. And it appears by *Style's Practical Reg.* 107. that the Court exercised a power in some cases of dispensing with bail altogether, and accepting from the defendant a deposit to a competent amount in lieu of it. And

[369]

(a) 23 *H. 6. c. 10.* Vide *Tidd's Prac.* 122. c. 7.

by

1807.

—
OMEALY
against
NEWELL.

[370]

by the course of the Court long before the stat. 12 *Geo.* 1. bail was not requirable if the defendant were sued for a sum under 10*l.* according to *Style's Pract. Reg.* 115. In this and various other instances the Court appears to have acted authoritatively on the subject of bail, as a matter peculiarly within its province: but in general, the adjustment of the amount to which the party should be held to bail was a matter left to be settled between the plaintiff and the officer in the first instance, according to the information afforded by the one, and the discretion exercised thereupon by the other. But as great abuses arose in cases of arrests of general writs of trespass, which was the usual form of writs before the stat. 13 *Car.* 2. c. 3., from the ignorance which defendants laboured under as to the nature of the action for which they were arrested; and which the officer also laboured under, as to the amount for which he should take bail for the defendant's appearance; the statute last mentioned directed, that no person arrested upon such general writ, in which the true cause of action was not expressed, should be forced to give security for his appearance at the return of such writ in any sum exceeding 40*l.* This statute however afforded an imperfect cure to the evil; for the party might still be arrested to the amount of 40*l.*, as he might have been before the statute: and although a cause of action was required to be expressed in the writ, in order to authorize the arrest of the defendant to a larger amount than 40*l.*; yet still the true cause of action was not required to be verified by oath or otherwise; nor was the plaintiff subjected to any particular penalty if the cause actually expressed in the writ should not be the true cause of action. The ultimate remedy on this subject was applied by the stat. 12 *Geo.* 1.: but this statute, except so far as it prohibits the holding to bail at all upon process out of the superior courts under 10*l.* &c., is not, as has before been observed, directly restrictive of any authority antecedently exercised by the Court, in respect to the holding to bail, but of the act of the plaintiff, in arresting by his own unaided act only. It left the practice therefore of arresting under an order of Court as it stood before the act. The statute is in its letter and terms at least susceptible of this restrained construction: it has constantly received this construction ever since it was passed; and has been acted upon accordingly as far back as the practice

1807.

 OMEALY
 against
 NEWELL.

practice of the Court can be ascertained by living memory, or traced by accessible documents of even an earlier period. The practice therefore may be considered as affording a contemporary construction of an act, not in its terms inconsistent therewith: and it is reasonable to suppose that the legislature might think that the same restrictions and guards, which it imposed on arrests by the mere act of the party, and of which it might be justly jealous, were not equally necessary to be applied to arrests made under the check and control, and authorized by the immediate sanction, of the Court. On the ground therefore of such a practice as has obtained on this subject, we are of opinion that the stat. 12 *G.* 1., worded as it is, does not prohibit the holding to bail by a judge's order, without the affidavit and other requisites which are prescribed in respect to arrest by the mere act of the plaintiff himself.

[371]

The next question is, whether supposing a defendant may be held to bail by a judge's order, he may be so, under an affidavit made out of *England*. And as, upon this supposition, the forms prescribed by the statute are unnecessary to be observed, upon a different species of arrest than that to which the statute relates, the amount of the debt may be made appear to the court by any such medium of evidence and information, as was resorted to for that purpose before the statute, or as the court might judge to be in its nature reasonable and proper. It is said in *Style's Prac. Reg.* 105, (speaking of course before the statute,) that *if a plaintiff required special bail, he ought to have shewn his cause of action before the Judge who took the bail*; "or else to draw such a declaration as he would stand to, and shew it to the defendant's attorney: that it might appear to the Court that there was cause why special bail should be given; otherwise common bail should be filed." It appears also from the note of the case in 8 *Mod.* 322, immediately preceding the statute, that an affidavit made in *Holland*, was admitted as *competent evidence to the Court* of the cause of action whereupon to hold the defendant to bail here. So that it appears that the Court exercised this authority upon various media of proof as to the nature and amount of the plaintiff's demand, and amongst others through that of affidavits made abroad. The most frequent instances in which the Judges have made such orders for holding to bail occur in respect to affidavits made in *Scotland* and *Ireland*,

[372]

1807.

—
 OMEALY
 against
 NEWELL.

Ireland, and the practice of doing so has been very common both in this Court and in C. P. as far back as any inquiry can be made with effect. One case of applications to hold to bail on foreign affidavits, in which the practice was drawn under the observation of the Court, occurred in the time of Lord *Mansfield*, v. *Brown*; and another, the case of *Voght* v. *Elgin*, in the time of Lord *Kenyon*, *Hil.* 38 G. 3. It appears by a short note of the latter case by my brother *Lawrence*, that the defendant was held to bail, on an affidavit sworn before the prætor at *Hamburgh*, on the motion of Mr. *Gibbs*. Search has been made, and we have found the original affidavit filed in Court, made before the prætor of *Hamburgh*, and his signature and authority to administer an oath verified by affidavit made here; as also the rule of court granted on reading those affidavits to hold the defendant to bail for 2,000*l.* It does not appear that any difference in point of reason or law exists between the holding to bail, as it is practised in the more frequent instances of affidavits made in *Ireland* and *Scotland*, and of affidavits made in places abroad out of his majesty's dominions. The practice in both cases must be equally warranted or unwarranted. In none of these cases can the party making a false affidavit be indicted specifically for the crime of perjury in the courts of this country: but in all of them, as far as the party is punishable at all, he is punishable for a misdemeanor, in procuring the court to make an order to hold to bail by means and upon the credit of a false and fraudulent voucher of a fact produced and published by him for that purpose. The party injured thereby is not without his remedy; nor the court without its due means of punishment in respect of the abuse and contempt committed against its authority. And as such a practice as has been stated, not inconsistent with the letter of the act of 12 G. 1. has prevailed ever since the act; and by probable inference and presumption before the act also; we are of opinion that the practice itself may be sustained in point of law, as to both descriptions of affidavits made out of *England* and verified here; namely, those made abroad out of his majesty's dominions before some magistrate or person of competent authority there, as well as before Judges and other persons authorized to take affidavits in *Ireland* and *Scotland*; and therefore that this rule must be discharged.

[373]

1807.

HILL *against* PATTEN.Saturday,
May 2d.

THIS was an action upon a policy of insurance on *ship and out-fit*, in a voyage upon the southern whale fishery out and home, which was effected in *September* 1804: and on the 13th of *March* 1805, long after the sailing of the ship on the voyage insured, but before any advice received of her, in consequence of some misunderstanding between the broker and his principal as to the broker's instructions at the time of effecting the policy, an application was made to the underwriters, who agreed to alter it (*a*), which was done by a memorandum indorsed on the policy in these words: "It is hereby agreed that the * interest on this policy shall be on *ship and goods* instead of *ship and out-fit* as originally declared." The ship was afterwards lost in the course of the voyage. It was objected at the trial before Lord *Ellenborough* at *Guildhall*, that however the policy might have been effected in the original terms of it, through a misunderstanding between the principal and his agent, yet the contract was equally binding between the contracting parties at the time; and as the risk had once attached, it was not competent to the parties to make the alteration, though by consent, without a new stamp; *goods* being a distinct subject-matter of insurance from *out-fit* in such a voyage; and therefore not within the exceptions of the stat. 35 *Geo. 3. c. 63. s. 13.* which enables the parties to make any alteration in the *terms or conditions* of a policy, so that *the thing insured*, (which must be taken to mean the same subject matter of insurance,) shall remain the property of the same person. The plaintiff however recovered a verdict; which was moved to be set aside

A policy effected on "ship and out-fit," on a voyage upon the Southern Whale Fishery out and home, cannot be altered by consent, after the ship sails, and the risk attaches, to an insurance on "ship and goods," without a new stamp; *out fit* the subject matter of insurance being essentially different in such a voyage from *goods*; and therefore not within the exception of the stat. 35 *Geo. 3. c. 63. s. 13.* which enables alterations to be made in the *terms or con-*

ditions of a policy, without having a new stamp, so that *the thing insured remains*, the property of the same persons, &c.

It seems however that shifting or successive cargoes on board the same ship in the course of the same adventure, (as in the *African* and other trades,) out and home may be covered by an insurance on goods.

*[374]

(a) The policy as it originally stood was on *ship and goods*, which was restrained by a written note in the margin to a *ship and out fit*; after which the indorsement restored it to *ship and goods*.

in

1807.
 ———
 HILL
 against
 PATTEN.

in *Michaelmas* term last; and a rule nisi was granted: against which *Dallas*, *Marryat*, and *Lawes* shewed cause; and *Garrow* and Sir *V. Gibbs* supported the rule. The case was directed to stand over till the judgment of the Court was given in *Kensington v. Inglis (a)*, in which the same clause of the stamp act was under consideration. And now

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

[375]

The question in this case was, whether the alteration of this policy, from a policy upon *ship and out-fit* to one on *ship and goods*, required an additional stamp, within the meaning of the stat. 35 G. 3. c. 63. s. 13. The policy was “at and from *London* to the *South Seas*, during the *ship’s stay and fishing there*, and at and from thence to *Great Britain, &c.*” The alteration was made from *ship and out-fit* to *ship and goods*, by consent of the underwriters, after the ship had sailed on the voyage insured, and of course after the policy had fully attached upon what was, at the time of such sailing, the thing or subject insured, viz. *ship and out-fit*. *Out-fit*, particularly for such a voyage as is described in the policy, differs materially from what is comprehended under the term *goods*. *Out-fit*, in a fishing voyage principally consists in the apparatus and instruments necessary for the taking of fish, seals, &c., and the disposing of them when taken, in such a manner as to bring home the oil, blubber, bone, skins, and other animal produce of the adventure, with the greatest convenience and advantage. As far as the *out-fit* consists of *provisions* put on board for the use of the crew, it is (according to the case of *Brough v. Whitmore*, 4 T. R. 206,) covered by an insurance on *ship*, being in effect part of the necessary *furniture, stores, and equipment* of every ship proceeding on a voyage. But *out-fit*, though it may in this qualified sense be considered as part of the ship or ship’s furniture, yet it cannot be considered as *goods* in any proper sense of that word; i. e., as part of the wares or cargo for sale, laden on board the ship: still less as part of the *homeward-bound cargo* in this voyage out and home; recollecting that in a fishing voyage the only *cargo* on board the ship from first to last is, in general, the homeward-bound cargo, consisting of the immediate produce

(a) *Ante*, 278.

1807.

HILL
against
PATTEN.

* [376]

and result of the fishing adventure. The *out-fit*, originally insured, being therefore thus essentially different from *goods* afterwards made the subject of insurance under this policy, the question is whether such * a change in the subject-matter of the insurance may be made in a policy once effected, without an additional stamp, in virtue of the provisions of the stat. 35 G. S. c. 63. The 13th sect. of the statute on which the question arises provides "that nothing contained in the act shall prohibit the making of any alteration, which may lawfully be made in the *terms or conditions* of any policy of insurance duly stamped as aforesaid, after the same shall have been underwritten, or to require an additional stamp duty by reason of such alteration: so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 10s. per cent., on the sum insured; and so that *the thing insured shall remain the property of the same person or persons*; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by reason or means of such alteration." And the question is, whether that part of the provision, which requires that "*the thing insured shall remain the property of the same person or persons*," has been in this case well complied with or not. The words, "the thing insured shall remain the property," &c., appear to us properly to require and apply to one identical and continued subject-matter of insurance; such subject-matter *all along remaining* the property of the same proprietor; and to be ill suited to a case like the present, where the thing last insured is not only in fact, but in name and kind, (as a specific subject of insurance,) essentially different from the thing first insured; and which begins also to have an existence at a different and much later period than the other; and when the thing, first insured, hardly, or in a small degree, *remains* or continues to exist at all. To make the words of the provision tally with such a case, instead of "*the thing insured*," it should be read, in the plural number, "*the things insured*;" and instead of "*shall remain*," it should be read "*shall be the property*," &c. Without some such change in its phrase, the

act

[377]

1807.

—
HILL
against
PATTEN.

act cannot well be accommodated to the case of several things, different in name and kind, as subjects of insurance, successively existing, and successively covered by one and the same policy of insurance: which is the case now before us. It is not however to be inferred from hence, that shifting of successive cargoes on board the same ship, in the course of the same continued adventure, as in the *African* and other trades out and home, may not properly be the subject of insurance under the word *goods*: for in some of those cases the successive cargoes, i. e. of *English* goods, *African* articles of traffic, and lastly *West India* produce, are, according to the course of such trading adventures, one continued subject-matter of insurance, under the one name of *goods*. The adventure is the same in its general denomination from first to last; though the parts of which it consists are not co-extending, but successive, and in kind and quality wholly dissimilar from each other. With all the unwillingness which we cannot but feel to give way to an objection, which the underwriters bring forward in despite of their own consent on this subject once given, we are nevertheless obliged to give effect to it, by pronouncing that the terms of the act have not been complied with; and that the policy, in its last and altered state, is to be considered, on account of such alteration, as an unstamped policy; and the contract which it purports to contain, as being on that account void; and the plaintiff therefore not entitled to retain the verdict he has obtained thereupon. There must therefore be a new trial.

Rule absolute.

[378]

1807.

WILLIAMS *against* HEDLEY.Saturday,
May 2d.

AFTER this case had been argued in the last term, upon a rule granted in *Michaelmas* term preceding to shew cause why the verdict, which has been obtained for the plaintiff at the trial before Lord *Ellenborough* at *Guildhall*, should not be set aside and a new trial had, by Sir *V. Gibbs* and *Wigley* in support of the rule, and by *Garrow*, *Marryat*, and *Lawes* against it; the case stood over for consideration till this term, when the opinion of the Court was delivered by

LORD ELLENBOROUGH C. J. This was an action for money had and received, brought to recover the sum of 965*l.* 0*s.* 8*d.* as having been unduly obtained by the defendant from the plaintiff, under an agreement to compromise a *qui tam* action for penalties of usury, brought by the defendant against the plaintiff, on the ground of certain usurious transactions which had taken place between the plaintiff *Williams* and one *Eagleton*. This sum of 965*l.* 0*s.* 8*d.* was the amount of the debt which had been owing from *Eagleton* to *Medley* and his partner: and the jury, to whom the question was left at the trial, found that * the payment of this debt of *Eagleton* by the plaintiff to the defendant was obtained from the plaintiff under the terror of the above-mentioned action of usury brought by the defendant, and then depending against him; and through the means of an agreement between the parties to compromise that action: and the plaintiff thereupon recovered a verdict against the defendant for the amount of the money he had so obtained from him. Upon the motion for a new trial two objections have been taken to the plaintiff's right to recover: the first was, that the plaintiff was *in pari delicto* with the defendant, as to the illegal compromise of the penal action; and on that ac-

Money paid by *A.* to *B.*, in order to compromise a *qui tam* action of usury brought by *B.* against *A.* on the ground of an usurious transaction between the latter and one *E.*, may be recovered back in an action by *A.* for money had and received. For the prohibition and penalties of the stat. 18 *Eliz.* c. 5. attach only on the "informer or plaintiff, or other person suing out process in the penal action, making composition," &c. contrary to the statute; and not upon the party paying the composition; and therefore the latter

does not stand, in this respect, *in pari delicto*, nor is *particeps criminis* with such compounding informer or plaintiff.

And such recovery may be had, although *E.*'s assignees had before recovered from *B.* the money so received by him, as money received to their use (the money paid by way of composition being at the time stated to be *E.*'s money;) there being no evidence at the trial of this case to shew that *A.* the present plaintiff was privy to that suit.

* [379]

1807. count not entitled to recover. The second objection was, that
 — as *Eagleton's* assignees had, after his bankruptcy, recovered this
 WILLIAMS money against the defendant and his partner, as money re-
 against ceived by them for the use of the assignees, the plaintiff could
 HEDLEY. not now recover the money against the defendant (a): the
 [380] plaintiff having as was contended on the behalf of the defend-
 ant, enabled *Eagleton's* assignees to recover that money from
 him and his partner, and thereby estopped himself now to re-
 cover it from the defendant. But as there was no evidence
 given at the trial of any act done on the part of *Williams* the
 plaintiff, in order to enable the assignees to recover, or which
 could be considered as rendering him in any degree privy to
 that suit, or liable for its consequences, that objection fell to
 the ground for want of its necessary foundation in point of fact:
 The first of these two objections is therefore the only one which
 remains to be considered. The answers given to it on the part
 of the plaintiff were, first, that the plaintiff, who was defendant

(a) So far as regarded this objection, the facts of the case on the motion for a new trial were stated to be these. *Eagleton* was indebted to several persons, and amongst others to *Eamer* and Co. in 965l. 0s. 8d. (the sum now recovered) and was arrested by them for that sum. The plaintiff *Williams* and *Clarence* his partner were bail for *Eagleton* in that action, and afterwards surrendered him into custody in discharge of themselves. *Eagleton* had disclosed to his creditors certain transactions between him and the plaintiff, which, if true, were usurious: in consequence of which a *qui tam* action was brought in the name of *Hedley*, the present defendant, against *Williams*; pending which the compromise in question took place; by virtue of which the sum of 965l. 0s. 8d. was, with the consent of *Hedley*, paid by *Clarence*, for *Williams*, to *Eamer* and Co., as for *Eagleton's* debt and as his money; and the proceedings in the penal action were gotten rid of by entering up judgment of nonsuit against the common informer for not proceeding to trial; and *Eagleton* was discharged as from *Eamer* and Co.'s suit. *Eagleton* however continued in custody at the suit of other creditors; and afterwards became bankrupt, in consequence of such imprisonment, as of a time before the payment of the money to *Eamer* and Co. This money the assignees recovered from *Hedley* the plaintiff in the *qui tam* action, as money of *Eagleton's* received by him to their use, and paid over by his authority to *Eamer* and Co. after *Eagleton's* bankruptcy.

1807.

—
 WILLIAMS
against
 HEDLEY

in the action for usury, was not prohibited by the statute 18 *Eliz. c. 5. s. 4.* from agreeing to this composition, and paying the money which *Hedley* received under it; but that the prohibition and penalties of the statute, in this respect, solely attached upon and were confined to *the informer or plaintiff* in the penal action, “or other persons concerned in suing out process, making of composition, or other misdemeanor, contrary to that statute;” and did not attach upon or extend to the defendant, the person compounded with; in other words, that it was the object of the statute to punish and restrain the parties using such colour, and availing themselves of the pretence of such offence, for the purpose of exaction, and not the party who was the object of such exaction. And such indeed, by comparing the language of the 4th *sec.* of this statute, by which the penalties are created, with the language of the 3d *sec.*, by which the prohibition is declared, appears to have been the true sense and intention of the legislature. The “making composition,” the “taking money reward or promise of reward for himself, or the use of another,” which are made so highly penal in the party guilty of those offences by the 4th *sec.* of the statute, are misdemeanors contrary to the true intent and meaning of the act, as declared in the immediately preceding sections; in which the only offence specifically prohibited is the “*informer or plaintiff's* compounding or agreeing with any person or persons offending or surmised to offend against any penal statute, &c.” and not “the *being* compounded or agreed with, as a defendant, in such information or suit.” And in *Pie's* case, *Hutton's Rep.* 36. Lord *Hobart* considers this statute in the same point of view, viz. “as made for the case of the subject. and for the avoiding and preventing of vexations by informations.” Assuming however, that the defendant, the person compounded with, is not within the express prohibitions and penalties of the act: it is still contended, that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute in question, it is so far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he be not therefore to be con-

[381]

1807.

WILLIAMS
against
HEDLEY.
*[382]

sidered as strictly *in pari delicto* (a) with the plaintiff, he is at *any rate *particeps criminis*, and in that respect not entitled to recover from his co-delinquent money which he had paid him in the course and prosecution of their mutual crime. But although this rule applies, (as was said by Lord *Mansfield*, in *Smith v. Bromley*, *Douglas*, 696, n.) "if the act be in itself immoral, or a violation of the general laws, of public policy : " yet in the case of other laws, " which are calculated for the " protection of the subject against oppression, extortion, and " deceit ; " Lord *Mansfield* lays down that " if such laws be " violated, and the defendant take advantage of the plaintiff's " condition or situation, then the plaintiff shall recover." And in the case of *Browning v. Morris*, *Cowp.* 792 Lord *Mansfield*, displays and enforces this distinction ; and refers to the case of *Jaques v. Golightly* in C. P. before Lord Chief Justice *De Grey*, where the same principles were adopted by the Chief Justice in the determination of that case. In respect to the criminal offence of compounding, the plaintiff *Williams* was the person whose situation was taken advantage of by the other party to the composition ; against which party the prohibitions and penalties of the statute of the 18 *Eliz.* are particularly levelled. It is no answer to this that *Williams* the plaintiff had been criminal in another matter, and towards another person, viz. *Eagleton*, in the usurious dealings with him ; for that criminality was perfectly collateral to the offence of compounding now under consideration ; and his very consciousness of those usurious dealings, and the dread of the consequences which

[383]

(a) It was said by Lord *Ellenborough* C. J. in the course of the argument, and seemed to be admitted by all, that when a plaintiff was *in pari delicto* with the defendant, money paid by the former to the latter could not be recovered back again ; and that this was settled in *Houson v. Hancock*, 8 *Term Rep.* 575. which latter case it was said by *Lawrence J.*, over-ruled *Lacaussade v. White*, 7 *Term Rep.* 535. And he also observed that from what fell from Lord *Kenyon* in *Houson v. Hancock*, relative to *Lacaussade v. White*, it was evident that his lordship had considered the last mentioned case as an action against a stake-holder ; in which he was mistaken. These and other cases upon the same point, such as *Vandyck v. Hewitt*, 1 *East*, 96. *Lubbock v. Potts*, 7 *East*, 456. and others cited in these, were referred to in the course of the argument.

might

1807.

 WILLIAMS
 against
 HEDLEY.

might result therefrom, laid him more completely at the mercy of *Hedley*, and enabled him to effectuate the extortion which is the foundation of this action. Indeed if the objection of *par-ticeps criminis* were allowed to hold in its full extent, none of the cases above mentioned could have been determined; nor could the party paying usurious interest recover back the excess beyond legal interest, as he is constantly allowed to do; and which is particularly taken notice of and urged by Lord *Mansfield* in his judgment in the case of *Browning v. Morris*. Upon the authority, therefore, of the cases above cited, as applied to the facts of the case before us; and finding ourselves upon the distinction taken and relied upon in those cases in favour of the party for whose benefit the provisions of the law, which has been violated, were peculiarly made, and of whose situation advantage has been unduly taken; we are of opinion that this action was, under the circumstances of this case, maintainable; and therefore that the rule for a new trial must be discharged.

The KING *against* The Inhabitants of AXMOUTH.

Saturday,
May 2d.

TWO Justices by an order removed *Martha Clarke*, and her infant children by name, from *Axmouth* in the county of *Devon* to *Lyme Regis* in *Dorsetshire*. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case:

**John Clarke*, deceased, was settled at *Lyme Regis* in the year 1800, when he was appointed an officer under the custom house of that place, and was stationed at *Axmouth* with a salary of 50*l.* On having this appointment he went to reside at *Axmouth*, and did the duty of his office there, and was charged 8*l.* per annum to the land tax in respect of his salary of 50*l.* until his death in 1806. There has been annually an order issued from the treasury, authorising the commissioners to direct the collector of the outports to reimburse those officers of the customs, whose salaries do not exceed 60*l.* per annum, the taxes assessed on such

X 3

salaries,

A custom house officer who was rated for his salary towards the land-tax, and in fact paid the rate himself, though the money was either given to him before hand for the purpose, or allowed to him afterwards by the collector, gains a settlement in the parish in which he is so rated and pays.

* [384]

1807.

The KING
against
The Inhabitants of
ARMOUTH.

salaries and paid by them; and the order directs that especial care be taken that no more be allowed than has been or shall be paid by such officers. It most frequently, though not always, happened, that *Clarke* was unable to pay the tax assessed on him, until he had received the same from the collector of the customs; and the tax collector of the parish was at such times in the habit of trusting *Clarke* with a receipt; and in every case, whether he had actually paid the tax or not, *Clarke* used to take the receipt to the collector of the customs, who was never acquainted with the fact of the tax not having been previously paid, and received the amount of the tax; there having been annually the order from the treasury during *Clarke's* executing the office. And at those times, when he had not before paid it, he would in his return pay to the tax collector of the parish the amount of his tax. The receipts were always given in the name of *Clarke*, and were left by him with the collector of the customs, by whom they were transmitted to the board in *London*, with the quarterly accounts, and were there kept. *Clarke* died in *April* last, and after his death his widow, *Martha Clarke* the pauper, paid to the tax collector of *Armouth* 2*l.* for a quarter's land-tax due at *Christmas* 1805 on the salary of her deceased husband; which has been since again paid to her by the collector of the customs:

[385]

Disney, in support of the order of sessions, contended upon the authority of *Rex v. Okehampton* (a), that this was a sufficient payment of the officer's share towards the public taxes or levies of the parish to gain him a settlement in *Armouth*, within the stat. 3 *W. S. c.* 11. s. 6. although he were repaid by, or received the money beforehand from, the collector for this purpose. All the cases shew that the land-tax is within the description of the act; and that it is sufficient if the officer be rated, and in fact pay it. So a tenant gains a settlement by being rated to and paying the poor's rate, or land-tax; although such payment be allowed to him by his landlord out of the rent (b). And he distinguished this from *Rex v. Weobley*, where though the exciseman was rated for his salary to the land-tax, yet it was in fact paid by the collector, without any deduction from the

(a) *Burr. S. G.* 5.

(b) *Rex v. Openshaw*, ib. 522. *Rex v. Bramley*, ib. 75. *Rex v. Chid-
ingford*, ib. 415. and *Rex v. Fulham*, ib. 480.

salary. Lord *Kenyon* there said that the exciseman neither paid it mediately nor immediately.

Harris, contrà, relied on the latter case where Lord *Kenyon* laid stress on the circumstance, that the officer was not affected by the payment at all: that it was not deducted out of his salary, nor was his income diminished by the payment. Such was the case here. How then can it be said that the officer paid his share towards the public taxes of the parish, when that which was paid was not paid out of his salary. But finding the opinion of the Court against him on this point, he attempted to shew that since the land tax redemption acts (*a*), which perpetuate the tax on lands as a charge upon the lands in the parish, and leave the tax on salaries as a mere personal tax, the rating towards and payment of it, in respect of the latter, no longer satisfied the words of the stat. 3 *W. 3. c. 11.* But

The Court all agreed that it was sufficient that it was still a public tax leviable and collected within the parish. That the whole tax, commonly called the land tax, was in the frame of it a personal tax; a certain proportion of which was to be raised in each parish, in respect to the property of the several persons assessed; the first specified subject of the taxation being goods. The more there was raised on one fund, the less was left to be levied on another. The land was merely considered as a fund in aid of the tax; though in course of time and for convenience sake it came to be considered as the principal object of the tax from whence it took its denomination. On the other ground.

Lord ELLENBOROUGH C. J. said that the question had been long ago decided in *Rex v. Okehampton*, which was in every point undistinguishable from the present case. The land tax being a public tax within the stat. 3 *W. 3. c. 11.* the officer was both charged to it and paid it within the parish: and nothing more was wanting to give him a settlement there. The case of *The King v. Weobly* was distinguished from the other cases by Lord *Kenyon*, because that the officer did not pay the tax mediately or immediately; and, as he says afterwards, because the pauper neither in fact paid the rate himself, nor constructively by the hands of his agent. But here he did in fact pay

1807.

The KING
against
The inhabitants of
AXMOUTH.

[386]

[387]

(a) 38 *Geo. 3. c. 60.* and 39 *Geo. 3. c. 6.*

1807.

The KING
against
The Inhabitants of
AXMOUTH.

it himself, And as to his being reimbursed afterwards, all the cases agree that that makes no difference; and that is not contradicted by *Rex v. Weobly*.

Per Curiam,

Order of Sessions confirmed.

*Saturd ay,
May, 2d.*

The King *against* The Inhabitants of BEDWORTH.

Where a coal mine becoming unproductive ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, although he be still bound by his covenant to pay the rent reserved to his landlord. Aliter, where the mine is itself productive, although it be worked to a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner.

*[388]

THE parish officers of *Bedworth* in *Warwickshire* made a rate dated 15th of *August* 1806, for the relief of their poor, in which they assessed "*John Woodhouse* for a colliery, as of the annual value of 200*l.* at 5*l.*;" against which rate *Woodhouse* appealed; and the Sessions amended the same by striking out the assessment upon him in respect of the colliery; subject to the opinion of this Court on a case stating, that Mr *Woodhouse* appealed against the rate assessing him for the colliery, as of the annual value of 200*l.*, on the ground that long before and at the time of making the rate he had ceased to work, occupy or enjoy the colliery, and therefore was not liable to be rated for it. That by a lease, made the 16th of *January* 1777, the governors of the hospital of *Nicholas Chamberlain* of *Bedworth* demised all the mines of coal, iron, stone, and other minerals lying under the lands therein described in the parish of *Bedworth*, for the term of 42 years; yielding and paying to the said governors during the said term the clear yearly rent of 200*l.* at the least and in all events, whatsoever the state of the said mines might at any time be, and whether any of the *coal, &c. should be gotten or not. That *John Woodhouse* entered upon the mines, and continued to work the same till the 1st of *May* 1804; at which time all the coals within them were totally exhausted and worked out. That no evidence was given that there was any iron, stone, or other mineral. And that the mines ceased to be worked. That during the times the mines were worked, *J. Woodhouse* was rated for the same, in some years at a much larger amount than 200*l.* That from the time of his ceasing to work the said mines he was not rated till the making of the present rate.

The Court thought it unnecessary to hear *Wilson* and *Clarke* in support of the amended rate : and after *Reader* and *B. Morice* had referred to *Rex. v. Parrott and others* (a); where though the lessees of a coal mine worked it at a loss to themselves, after paying their rent, they were still holden liable to be rated :

1807.

The KING
against
The Inhabitants of
BEDWORTH.

Lord ELLENBOROUGH C. J. said ; In that case the subject matter itself was profitable, and produced value to the owners, though the immediate occupiers derived no profit from it ; all the net profits of the mine being absorbed by the sixth part of the gross value which they had covenanted to pay to the owners. But here the mine itself is exhausted, the subject matter of profit is gone, although the rent, which was no doubt calculated upon the probable average produced during the whole term, be still payable. The failure of the coal will not discharge the lessee's covenant to pay rent : perhaps he may have calculated upon that event ; and may have received during the former part of his term an adequate value from the then produce of the mine to compensate the continuance of the rent to the end of the term. But with respect to the parish, he is only rateable for the concurrent annual (b) value during the period for which the rate is made ; and when the thing which he occupies no longer affords any such concurrent value, the subject matter of the rating is gone.

[389]

Per Curiam,

Amended Rate confirmed.

(a) 5 Term Rep. 593.

(b) This was said with reference to the rate in question ; which was for a year, and in which the party was rated as for the annual value of the colliery.

The KING against BULLER and Another.

Saturday,
May 2d.

THE defendants, the late mayor and deputy mayor of the borough of *Saltash* in *Cornwall*, were called upon by a rule to shew cause why a writ of mandamus should not issue com-

If a presiding officer, who by the constitution of the borough forms an in-

tegral part of an elective assembly, depart from it after the meeting has been regularly formed, and the election entered upon, but before it is completed, an election made after his departure is void

manding

1807.

—
The KING
against
BULLER
and Another.

manding them to deliver to *J. Gaborian Esq.*, the present mayor, the mace, common seal, books, papers, and records, and the keys of the chest belonging to the borough. This rule was obtained upon an affidavit of *Mr. Gaborian*, stating his own election as mayor in *January* last, and a subsequent application to the defendants, who were in possession of the insignia, &c. of the office, and their refusal, and that he had been prevented from executing his office by one of the defendants claiming to act as deputy mayor under the other. And also upon an affidavit of the town clerk, stating that by charter of the 14 *Geo. 3.*, the borough was incorporated by the name of the mayor and free burgesses, &c. That there should be seven capital burgesses to be called alderman, one of whom should be elected mayor, as therein mentioned. That on the death of an alderman, (all of whom were chosen for life,) the mayor and the rest of the aldermen and free burgesses, or the major part of them, should elect and swear in one of the free burgesses inhabitants in his place. That on the 28th of *November* last a mandamus issued to the mayor and the rest of the aldermen and free burgesses, reciting the death of one of the aldermen, and commanding them duly to assemble together in the *Guildhall* of the borough, &c. and to elect one of the free burgesses into the vacant office, and also that such of them to whom the same of right belouged should administer the oath of office to the person so elected, That in pursuance of that writ, the mayor, aldermen, and free burgesses met, on the 18th of *December* last, at the *Guildhall*, for the purpose of proceeding to the election, in pursuance of a regular summons; when *P. Spicer* and *E. Hawkins* were proposed as candidates; but that before three votes had been given or tendered, *Mr. Hawkins*, in the presence and hearing of all present, admitted that he had not taken the sacrament: That *J. Buller* presided as mayor, and 4 other aldermen and 24 burgesses were present, out of whom 3 aldermen and 15 burgesses voted for *Spicer*, and the others for *Hawkins*. That *Spicer* was afterwards duly sworn in before *Gaborian* and *Drew*, two of the aldermen; in consequence of which they returned *Spicer* as duly elected, in answer to the mandamus. That by the charter, the mayor, aldermen, and burgesses, or the major part of them, on the charter-day in *September* for the election of mayor, are to assemble in the *Guildhall*; and being so assembled,

sembled, the mayor and aldermen, or the major part of them, are to nominate and put in election for mayor two * of the aldermen; and there continue together, or in due manner adjourn until the mayor, aldermen, and burgesses, or the major part of them, then and there assembled, shall have elected one of those two aldermen so put in election, for a year; and that before the mayor so elected shall be admitted to the execution of his office, he shall be sworn before the last mayor his predecessor, or, in his absence, before two other aldermen, to execute his office for a year, and until his successor be appointed. That a mandamus issued on the 4th of *November* last to elect and swear in a mayor; no election having been made on the last charter-day; and in pursuance thereof, on the 20th of *June* last, the defendant *J. Buller*, then mayor and alderman, and six other aldermen, (including *Spicer*), and 13 burgesses, duly assembled at the *Guildhall* for the purpose of proceeding to the said election, when the mayor and two other aldermen nominated the two latter for mayor; and the other four aldermen, including *Spicer*) nominated *Hicks* and *Gaborian* (two of the four) for mayor. That after *Gaborian* had been so nominated, *Mr. Buller*, the mayor, and the two other aldermen in whose nomination he had joined, *quitted the Guildhall*; but the other aldermen and a majority of the burgesses before assembled continued together, and proceeded in the election, and elected *Gaborian* to be mayor for the year ensuing; who, in the absence of the last mayor, was then and there duly sworn in as mayor before the senior alderman present and presiding, and another alderman; and they accordingly returned him as elected mayor in answer to the writ. Notwithstanding which the defendant *Mr. Buller* still claimed to be mayor, and refused to deliver up the insignia, &c.

Garrow, *Dampier*, and *Abbott*, upon shewing cause against the rule, objected that upon the face of the relator's own affidavits it appeared that *Mr. Gaborian* was not duly elected mayor: for by the charter the then mayor is an integral necessary part of the elective assembly; and he having departed before any election made, it was not competent to the other members to proceed to make an election of the successor, but such election was absolutely void.

1807.

—
The KING
against
BULLER
and Another.
*[391]

[392]

1807.

—
The KING
against
BULLER
and Another.

Park and *Pell* on the other hand contended, that the elective assembly having been once legally constituted for the purpose of the election, and the election having began, the assembly continued competent for that purpose till the election was completed, notwithstanding the departure of the old mayor in the mean time.

The Court, however, considering that by the terms of the charter the old mayor who presided was an integral part of the body by which the election of the new mayor was to be made, were of opinion that it was necessary for the former to be present during the whole period of the election until it was completed. And that for want of his presence at the time when *Mr. Gaborian* was elected, such election was void. And therefore they discharged the rule. But at the sitting of the Court on the *Monday* following one of the judges intimated, that some doubt had occurred to them upon a case (a), which he had met with after the Court broke up on *Saturday*; but that being in a book of doubtful authority, they wished to make further inquiry concerning it before the matter was finally disposed of. And therefore the Court directed that their former order for discharging the rule should not be drawn up before the last day of the term; so that if they should not satisfy their doubt, the mandamus might go. Nothing further, however, being said upon it, the rule for the mandamus stood discharged.

[393]

(a) This was afterwards stated to be the case of *Rex v. Norris, M. 4 Geo. 2. 1 Barnard, 385*, when mention was made again of this case in the following term, upon a rule calling upon *Mr. Gaborian* to shew by what authority he claimed to be mayor of *Saltash*; which rule was obtained by the Attorney-General, grounded upon the invalidity of the abovementioned election. It was then also stated from the Bench, that no mention was made of this case in the MS. notes of that period; nor were the affidavits of it now to be found in the Crown-office. The rule against *Mr. Gaborian* was afterwards made absolute, without any further opinion expressed by the Court.

1807.

TAYLOR *against* The ROYAL EXCHANGE Assurance Company, *Tuesday, May 5th.*

UPON a rule for the master to review his taxation, who had, in taxing costs for the plaintiff, allowed him the costs of examining witnesses abroad on depositions, to which the defendants on a motion in court had consented in order to save the expence of a commission; the master, upon reference to him, reported to the Court, that he was satisfied that he had proceeded upon a mistake: and that when a party applies for this indulgence, which is consented to on the other side, he virtually undertakes to examine his witnesses on depositions abroad at his own expence, and is not entitled to any allowance on the taxation of costs. *Garrow*, who was to have opposed the rule, acquiesced on hearing the master's report. And *Park*, on moving for the rule, said that the practice of the Court of Chancery was clear, that a party applying for a commission to examine witnesses on his behalf must pay the expences: and that unless this Court adopted the same rule, in respect to the party applying for leave to examine witnesses abroad on deposition, which could not be done without the other party's consent; such consent would never be given, but the applicant would be driven to the expence of applying for a commission.

Where a party obtains leave, by consent, to examine witnesses abroad on depositions, he is not entitled to be allowed the expence of taking the depositions in the taxation of costs, though he succeed.

[394]

Rule absolute.

1807.

Tuesday,
May 5th.

WELCH *against* NASH.

Under the 19th section of the general highway act 13 G. 3. c. 78. a new highway must be set out before an old one can be stopped up; and it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. And if a new highway be not set out before the old one be stopped up, the legality of the orders of the justices for diverting the old road and stopping it up may be questioned in an action of trespass, notwithstanding such orders were confirmed by the Sessions on appeal, stating the fact of a new road being set out in lieu of the old one. The defendant cannot justify, under the general issue, the cutting the posts and rails of the plaintiff though erected upon the defendant's own land; there being no question raised as to the property remaining in the plaintiff.

IN trespass, the first count was for entering one close of the plaintiff called the *Shrubbery*, and another close formerly part of a public highway, in the parish of *Claines* in the county of *Worcester*, and for destroying the shrubs, &c. and breaking down and destroying the gates and walls, posts, rails, and fences upon and round the said closes, and for carrying away and converting the same to the defendant's use. A second general count was, for the like trespasses in breaking down and destroying the gates &c. of the plaintiff in the same parish, not laying them to be on the plaintiff's closes. Pleas, 1st, the general issue. 2dly, A justification to the several trespasses; that in, through, and over the several closes in which, &c. there was and yet is a public carriage highway; and because the said gates were wrongfully erected in the said closes and across the said highway, and obstructed the same, and the said walls, posts, rails and fences at the times when, &c. were wrongfully erected in, upon and across the said highway there, and obstructed the same, &c.; the defendant, in order to open the said highway, committed the alleged acts of trespass,* and removed the materials to a small distance from the place where the same had been so wrongfully erected and stood as aforesaid, and left the same in a proper place for the use of the plaintiff. The replication joined issue on the first plea, and traversed the public highway pleaded in the second plea; and new-assigned that the defendant broke and entered the said closes and committed the several trespasses declared on for other purposes and on other occasions than those mentioned in the second plea, and out of the said supposed ways therein mentioned: and also for that the defendant committed the trespasses in a greater and more excessive manner and degree than was necessary for the use and enjoyment of the said supposed ways. The rejoinder took issue on the plaintiff's traverse of the public highway, and pleaded not guilty to the new assignment; upon which issue was joined. And at the trial before *Sutton B. at Worcester Lent* assizes 1806, a verdict was found for the plaintiff upon the 1st and 2d issues,

with 1s. damages; subject to the opinion of this Court, as to the 2d issue, upon the following case. And on the last issue a verdict was entered for the defendant; but if this Court should be of opinion that, as the pleadings stood, it ought to have been entered for the plaintiff, the verdict was to be altered accordingly, with 1s. damages.

1807.

—
WELCH
against
NASH.

The spot upon which the trespass (except as to the 3d issue) was committed, was part of a public highway within the parish of *Claines*, in the hundred of *Oswaldslow*, branching out of the turnpike road which leads from *Worcester* to *Kidderminster*, and which part of the said highway, before it was stopped up, passed close by the gate at the entrance of the plaintiff's dwelling-house, and led into another highway called *Egg-lane*, about 275 yards from the entrance of the first-mentioned highway. *Egg-lane* itself branches out of the turnpike-road between *Worcester*, and *Kidderminster*, nearer to the former place than the public highway so stopped up, and communicates with the upper part of that highway. (The course of the road stopped up and the course of *Egg-lane* were delineated in a map annexed to the case, which was a copy of that enrolled at the Sessions with the proceedings.) On the 3d of *September* 1803 that part of the highway which passed by the plaintiff's gate, and led into *Egg-lane*, was stopped up by the authority of two justices, whose orders, together with all the proceedings respecting the said road, were duly enrolled by the clerk of the peace for the county of *Worcester*. The orders and proceedings enrolled are as follow: (These proceedings were all set out at length in the case. They were in substance,) 1st, the authority of the plaintiff Mr. *Welch* of *Hawford* in the parish of *Claines*, and of Mr. *Wall* of *Worcester*, the owners of the land described in the plan through which part of the road in question was described as *intended to be diverted and turned*, consenting to *making and continuing such new highway* through their said lands. Given under their hands and seals the 17th of *September* 1803. The 2d, An order under the hands and seals of *T. B.* and *G. T.*, two justices of the peace for the county of *Worcester*, stated to be made at a special Sessions holden at *Hawford* in the parish of *Claines* in the hundred of *Oswaldslow* in that county; stating that "On *Friday* the 23d of *September* 1803, having, upon a view, found that a certain part of a highway within the said parish of *Claines*, &c. branching out of the turnpike

[396]

1807.

WELSH
against
NASH.

*[397]

pike road leading from *Worcester* to *Kidderminster*, &c. in a north-eastwardly direction by the side of and close to the gate * at the entrance to the dwelling-house of *Wm. Welch* Esq. at *Hawford*, &c. and leading by the said gate in the same direction into *Egg-lane* in the said parish to a certain mill, &c. lying between that part of the highway which is by the side of and close to the gate at the entrance to the dwelling house of the said *Wm. Welch* at *Hawford* aforesaid, and on other part thereof where it runs into and adjoins the said lane called *Egg-lane*, of the length of 480 yards or thereabouts, and particularly delineated and described in the plan annexed, may be *diverted and turned*, so as to make the same more commodious to the public; and having viewed a course proposed for the *new* highway in lieu thereof through the lands of the said *W. W.* and *S. W.* &c. both situate in the parish of *Claines* aforesaid, and *along the said lane called Egg-lane* to its entrance at the end thereof into the said turnpike road leading from *Worcester* to *Kidderminster*, of the length of 667 yards or thereabouts, and of the breadth of 14 feet, particularly described in the plan hereto annexed; and having received evidence of the consent of the said *W. W.* and *S. W.* respectively to the said highway being made through their said lands respectively hereinbefore described, by writing under their hands and seals: do hereby *order the said highway to be diverted and turned* through the said lands belonging to the said *W. W.* and *S. W.* and *along the said lane called Egg-lane* to the end thereof at its entrance in the said turnpike road.”

The 3d, An order of the same magistrates and of the same date, stating that they, being the justices who viewed the *old* and *new* highways described in the plan annexed, thereby certified that they had viewed the *new* highway therein described, and that the same was fit for travellers. The 4th, An order

[398]

of the same magistrates and of the same date, stating that they having “viewed the several highways described in the plan annexed, and made an order for *diverting the old highway*; and being satisfied that the *new* highway therein described is properly made and fit for travellers, did thereby order the said old highway, lying between that part of the said highway which is by the side of and close to the gate at the entrance of the dwelling-house of *W. W.* Esq. situate at *Hawford*. &c. and another part thereof where it runs into and adjoins *Egg-lane*, also situate in the parish of *Claines* aforesaid, of the length of 480 yards or there-

1807.

WELCH
against
NASH

thereabouts, and of the breadth of feet or thereabouts upon the average, as appears by the said plan, to be stopped up, and the lands and soil of so much thereof which lies between the said side of and close to the gate at the entrance to the dwelling-house of the said *W. W.* on the north-east corner of a shrubbery of the said *W. W.* to be vested in the said *W. W.* whose lands adjoin thereto, in exchange for the land of the said *W. W.* and of *S. Wall* of, &c. taken for making the said *new* highway; the said *W. W.* having compensated and satisfied the said *S. W.* for the land belonging to him the said *S. W.*, so taken for making part of the new highway; and the said *W. W.* having also, at his own expence, completed the whole of the said new highway; and that the land and soil of the residue of the said road which lies between the north-east corner of the shrubbery of the said *W. W.* and the place where it runs into and adjoins *Egg-lane* shall be sold by the surveyor of the highways of the said parish of *Claines*," &c. Against these proceedings and orders the defendant appealed to the *Michaelmas* Quarter Sessions 1803; upon which appeal the proceedings and orders of the justices were confirmed. After this determination of the appeal, viz. at the time laid in the declaration, the defendant came with his servants to the place where the road had been stopped in pursuance of the order of the magistrates, and cut down twenty one feet of railing which had been placed along the side of a field belonging to himself, from which, before the road was stopped up, he passed by a gate into the road in question. *He also cut down one of the posts to which the railing was fixed; which railing and the post stood in a ditch along the side of the defendant's field, the soil of which ditch belonged to the defendant,* and formed no part of the road which had been stopped up. On the part of the defendant it was proved that at the time when the road which passed by the plaintiff's gate was stopped up, *the magistrates had only widened the course of Egg-lane by throwing into it those several pieces of land (all on the right hand side of Egg-lane) given up by the plaintiff and Mr. Wall as stated in the proceedings; but had not otherwise given it a new direction; the left-hand side of Egg-lane remaining as before without any addition.* *Egg-lane*, though a carriage road before this alteration, was so narrow as to be inconvenient for carriages to go along it, and was in almost an impassable state, until it was put into complete repair by the plaintiff, at a considerable expence. He also proved that *Mr. Tuberville* one of the magis-

[399]

1807.

WELSH
against
NASH

[400]

trates by whom the order was made, though a justice of the county of *Worcester*, (as all justices are; none of them being appointed to particular hundreds;) and acting therein, *did not at that time reside within the hundred of Oswaldslow (a)*: and that though there were other acting magistrates residing within the said hundred of *Oswaldslow*, none of these were summoned, or received notices to attend the special sessions at which the several orders before stated were made by Mr. *Bund* and Mr. *Tuberville*. To this evidence adduced by the defendant the plaintiff's counsel objected: insisting that the orders of the magistrates, confirmed upon appeal by the Court of quarter sessions, were conclusive as to these matters; and that they could not be entered into this in action. Mr. Baron *Sutton*, however, received the evidence, subject to the opinion of this Court. The questions for the opinion of the Court were, 1st, whether the evidence adduced on the part of the defendant, and objected to by the plaintiff; counsel, were properly received. And if so, 2dly, whether the defendant were entitled to a verdict on the second issue. And 3dly, whether the plaintiff were entitled to a verdict on the last issue; the defendant not having justified cutting down and removing the post damage feasant on his land. This case was to be turned into a special verdict if the Court should so direct.

[401]

Puller, for the plaintiff, contended, first, that the whole proceedings for turning the road, &c. having been confirmed on appeal to the quarter sessions, to which jurisdiction of the subject matter was given, the judgment of that Court was conclusive upon the right of all parties; and its propriety could not be questioned in this action. It is insisted however that the 19th sect. of the general highway act 13 *Geo. 3. c. 78.* imposes as a necessary condition on the exercise by the magistrates of the power given to them of stopping up an old highway, that they should set out a new highway: and that here no new highway has in fact been set out, but only an old highway widened by the addition of detached pieces of the land adjoining to one side of it. But whether a *new* road has or has not been set out is purely a question of fact, and therefore like the question, whether more commodious or not to the public, more proper for the consideration of the sessions than for this Court. The same

(a) This was considered, upon the argument, to be of no consequence: the statute is in this respect only directory.

section

1807.

WELCH
against
NASH.

section of the act says, that it shall be lawful for any person aggrieved by any such order or proceeding to make his complaint thereof *by appeal* to the next sessions after the order made, who are authorized to hear and *finally* determine such appeal: and if confirmed on appeal, the inclosures may be made, and the ways stopped up; and *the proceedings thereupon shall be binding and conclusive to all persons whomsoever*. It certainly therefore was the intention of the legislature to give the sessions conclusive jurisdiction over some matters; and it is difficult to imagine any subject more proper for their consideration than the fact of a new road. All through the orders the new road is mentioned as contradistinguished from the old one: and it cannot now be inquired of, how the new road was made. In *Davidson v. Gill* (a) the order of the justices for stopping up the old, and setting out the new road, was defective upon the face of it, in not following the form prescribed in the schedule, which requires the length and breadth of the new road to be set out; which defect it was considered might be taken advantage of in a collateral proceeding. But here the proceedings are all regular upon the face of them. Supposing however that the setting out of a new road is an indispensable condition of the power of the magistrates to shut up the old road; and that the fact of setting it out is inquirable in a collateral proceeding; he contended that the widening of another old road, so as to make it more commodious to the public, would satisfy the provision of the act. [*Grose*, and *Lawrence*, Justices, asked whether if there were two roads both narrow and inconvenient, leading to the same place, the magistrates could not order one of them to be widened, without stopping up the other: and referred to the 16th sect. of the act which expressly gives them jurisdiction to widen roads which are inconveniently narrow, where the same may be conveniently done, without diverting them.] That section applies to a different case, where no consent is necessary of the owners of the lands over which the new road is to be turned. But the 19th sect. which gives the power of diverting an old road with such consent, does not in terminis impose it as a condition that an entire new road shall

[402]

(a) 1 *East*, 64.

1807.

—
WELSH
against
NASH.

be made in lieu of the old one, throughout the whole course of it. Nor will the Court put so strict an interpretation upon the words when so much latitude of discretion was meant to be left to the Justices. And here there is a new road running parallel with the old highway along *Egg-lane*.

Lord ELLENBOROUGH C. J. This is a question of jurisdiction: the magistrates have only jurisdiction conferred on them in a given case: they may *divert* an old road, so as to make it nearer or more commodious to the public; that is, by making a new road. The whole section contemplates that a *new* highway is to be made in lieu of the old one which is to be stopped up; and the magistrates can only order the old highway to be stopped up on the condition that a new highway has been made and put in a proper state. But what *diverting* or *turning* of the old road has there been in this case? or what *new* highway has been given in lieu of the old one which is stopped up? The facts are simply these; the magistrates have extinguished and stopped up one old road, and have enlarged another in different parts of it: but the termini a quo and ad quem, and the direction of it, remain the same as before. Increasing the width of one old highway is neither *diverting* another old highway, nor making a *new* one: and the justices cannot make facts by their determination in order to give to themselves jurisdiction, contrary to the truth of the case. There is the less reason too for saying that a new highway has been set out in lieu of the old one, because *Egg-lane* has not been widened through its whole course, but the additions are only made in patches; so that if the whole course of the highway there were stopped up, there would be no continuity of road in any other place in lieu of the other old highway which has been stopped up. Therefore however desirous we may be of consulting the convenience of individuals in this respect, in a case too where we may reasonably conclude from the adjudication of the magistrates in sessions that the alteration is more commodious to the public: yet the words of the act are too strong to get over; and we cannot extend the jurisdiction of others any more than we can our own.

GROSE J. declared himself of the same opinion; and referred to the 16th section, as pointing out the distinction between widening

widening an old road, which is there provided for; and diverting the old and making a new road preparatory to stopping up the old one, which is provided for by the 19th section.

LAWRENCE J. The Justices cannot give themselves jurisdiction in a particular case by finding that as a fact which is not the fact. Suppose they had turned the road through a man's grounds, without his consent, would their finding the fact of his consent give them jurisdiction under this section when the act had given them none? Or suppose they had turned it through any of the excepted places (a). The words of the 19th section are *divert* or *turn*; which certainly mean altering the direction of the road. Then all through it speaks of such *new* highway in contradistinction to the *old* highway; that means such *new* highway by the *diversion* or *turning* of the old one. The widening of *Egg-lane*, in different parts, which was a highway before, does not answer the description of a new highway in the 19th section. The 16th section affords a comment on the 19th, which it is difficult to get rid of; for the latter uses the words *diverted and turned*, as different from *widened and enlarged* in the former section.

LE BLANC J. observed that the fact did not support the argument.

Puller then contended that the plaintiff was entitled to a verdict on the new assignment.

The Court said they were with him on that point; for that the defendant could not justify under the general issue the cutting the posts and rails of another, though put upon the defendant's own soil.

Martin for the defendant urged that if one fixed posts, &c. on another's land, he made them the property of that other: and referred to *Stead v. Gamble* (b). But

The Court said that was a case of costs, and not of pleading, and did not apply to the present. That here the defendant makes it part of his complaint, that the plaintiff had put his posts and rails on the defendant's land across the highway: and

(a) Vide s. 16.

(b) 7 East. 325. But it was no part of the question in that case whether a wrongful placing of rails by a stranger in another's soil transferred the property in them to the owner of the soil.

1807.

WELCH
against
NASH.

[404]

[405]

1807:
—
WELCH
against
NASH,

the case reserved shews that the posts and rails were meant to be stated as the property of the plaintiff: the cutting them, therefore, could not be justified under the general issue.

Postea to the plaintiff on the general issue to the new assignment: and a verdict to be entered for the defendant on the other issue.

Saturday,
May 9th.

The KING against The Inhabitants of HORSLEY.

A sole next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing 40 days in the same parish after the intestate's death, before administration granted to her. And it matters not that the widow of the intestate survived him, if she died afterwards without having taken out administration, leaving the

SARAH BARNFIELD, widow, a pauper, was removed by an order of two justices from the parish of *Horsley* to the parish of *Avening*, both in the county of *Gloucester*. The Sessions on appeal quashed the order, subject to the opinion of this Court on a case, stating that the pauper is the widow of *John Barnfield*, who died in 1801, and was legally settled in *Avening*. That *W. Palzer*, the father of the pauper *Sarah*, died about *Christmas* 1802, intestate, possessed of a leasehold house in *Horsley* of 40s. per annum, for a term of years; leaving a widow, and the pauper, his only child whom he had by a former wife. That *W. Palzer's* widow died about a month after her husband. That upon the death of *W. Palzer*, the pauper his daughter, who had previously * occupied the said leasehold house by permission of her father, continued to reside in it till the death of her mother-in-law, when she left the house, and let it to a tenant, who occupied it for three years from that time, and paid the rent for it to the pauper. That the pauper during this time, and until the date of the order of removal, resided with her family in *Horsley*. That on the 11th of *Jan.* 1806 the pauper obtained letters of administration to her father *W. Palzer*: and on the 29th of the same month she

other sole next of kin to the intestate. But no settlement is gained by the mere relation back to the death of the intestate of the letters of administration when granted, taken out only 18 days before the next of kin parted with her interest in the leasehold; so as to connect the residence for those 18 days with a residence by such next of kin in the same parish for more than 40 days, after the deaths of the intestate and his widow, before such administration granted.

*[406]

sold

sold and assigned her interest in the said premises to *W. Daniels* who has ever since continued in possession.

1807.

The KING
against
The Inhabi-
tants of
HORSLEY.

Gaselee, W. E. Taunton, and *Lord*, in support of the order of sessions, contended first, that the pauper, as sole next of kin of her intestate father (after the death of her mother-in-law) had such an equitable interest in the leasehold property, that by residing 40 days in the same parish she gained a settlement. In *Rex v. Cold Ashton* (a) Lord *Mansfield* distinguished between the case of a sole next of kin, and where there were others entitled in an equal degree; that the former might gain a settlement by residing 40 days in the parish where the intestate's property was before administration granted. And this distinction was recognized by *Kenyon* in *Rex v. Offchurch* (b). The cases which have been determined against the settlement of the next of kin, are either where more than one were beneficially entitled under the statute of distributions, although one only were entitled to take out administration; or where administration was not taken out at all; or at least not taken out till after the interest in the premises expired in respect of which the settlement would accrue. Such were the cases of *Rex v. Widworthy* (c), *South Sydenham v. Lamerton* (d), *Rex v. Lower Swell* (e), *Rex v. Northcurry* (f), and *Rex v. Chew Magna* (g). [A doubt was thrown out in the course of the argument, whether the pauper though sole next of kin to her father, were solely entitled in interest: for the representatives of the mother-in-law would be entitled to her share. But it was answered that none other appeared on the case to be entitled, and the mother might in fact have had no next of kin, or she might have been a natural child, and so could not have any by law; or the pauper might have been her sole next of kin.] 2dly, They contended, that

[407]

(a) *Burr. S. C.* 450.(b) 4 *Term Rep.* 117.(c) *Burr. S. C.* 109. *Andr.* 4 and *Cas. temp. Hardw.* 392

(d) *Case of Set.* 95. from whence it is cited in *Burn's Just.* tit. *Poor*, tit. *Settlement by Estate*, and in chap. 10. of *Const's Bott* under the same title. 1 *Stra.* 57. reports the same case on a different point. 10 *Mod.* 388. states the point, but says that the Court gave no opinion upon it. Fol. 81. *S.C.* shews that it was the case of a sole next of kin.

(e) *Burr. S. C.* 436.(f) *Cald.* 137.(g) *Cald.* 365.

1807.

The KING
against
The Inhabi-
tants of
HORSLEY.

the letters of administration, which were in fact taken out 18 days before the removal, and while the pauper's interest in the premises still subsisted, (which distinguished the case from that of *Rex v. Widworthy*) had relation back to the death of the intestate, so as to vest in her the legal property of the term from that time. This is laid down in 1 *Com. Dig.* tit. *Administration*, B. 10. which cites a case in *C. B. M.* 9 *Ann.* and 2 *Rol. Abr.* 554. l. 15 and 25. which latter books refer to 18 *H. 6.* 22. b. (with a dubitatur) and 36 *H. 6.* 8. and *Wittingstall v. Sir Miles Sands.* E. 11 *Car.* 1. which was affirmed in error. So in ejectment by an administrator the demise may be laid before administration granted: for when granted, it will relate back and shew the title in the administrator from the death of the intestate. Here then the pauper has had both in actual possession, and, by relation, a legal title, if that be necessary, in the estate, for more than 40 days, during which time she resided in the same parish.

[408]

Phelps contra, on the first point, said that this was not like the case of a cestuy que trust; for if so, it would make no difference whether there were one or more next of kin entitled to claim administration; but all the cases agreed that if there were more than one so entitled, no settlement could be gained by their residence on the estate: and though there were some dicta in favour of a sole next of kin; yet it had never been so decided, and the distinction could not be supported on principle: and as far as the point was in judgment in *South Sydenham v. Lamerton*, the decision is the other way. Strictly speaking, he said, no person was entitled as of right to administration; for it was in the discretion of the Ordinary to grant it even to a stranger, though there were other next of kin to the intestate; and it was still often granted to a creditor. [Lord *Ellenborough* C. J. It is so much a claim of right in a sole next of kin, that if the Ordinary refused to grant administration to him, the Court will issue a mandamus to enforce it. And *Lawrence* J. said that there was a case in the books (a) of two next of kin a widow and child; where though the Court refused to issue a mandamus to the Ordinary to grant administration to one of them in particular; yet they commanded him to grant it to

(a) *Vide* Anonymous, 1 *Stra.* 552.

one or other of the next of kin, leaving him to make the election amongst persons having equal claims (a).] Then as to the point of relation; though the administration, when granted, may vest the property in the administrator as from the death of the intestate for the purpose of suit; yet it cannot have the effect of making the next of kin irremovable for a time past, when it must be admitted that she was removeable, unless by reason of any equitable interest which as sole next of kin she might have in the premises. In fact, she was only irremovable, by reason of administration, for 18 days instead of 40. *Rex v. Widworthy* is in point to this part of the case.

The Court then said, that they had no doubt upon the last point; that the grant of administration could not operate by relation to make a person irremovable for a time past, who during that time was removeable. But they would look into the cases upon the other point, in deference to the opinion intimated by Lord Mansfield in some of the cases as to a distinction in favour of a sole next of kin. And a few days afterwards

Lord ELLENBOROUGH C. J. delivered judgment. This is the case of a sole next of kin exclusively entitled, after the death of her mother-in-law, to administration of the personal estate of the intestate, her father. And the question is, whether the pauper having, after she became such sole next of kin to the intestate, resided more than 40 days in the parish, in which a leasehold tenement of 40s. per ann. belonging to the intestate lay, thereby gained a settlement in that parish? This is not a settlement claimed under the stat. 9 Geo. 1. c. 7.; the estate not having come to the pauper by purchase: but it is claimed on the mere ground of a 40 days' residence in a parish, without being removeable. The grant of letters of administration, though it may have the effect of vesting the leasehold property in the administratrix by relation, so as to enable her to bring actions in respect of that property for all matters affecting the same subsequent to the death of the intestate; and though it may also render her liable to account for the rents and profits

1807.

The KING
against
The Inhabitants of
HORSLEY.
*[409]

[410]

(a) Vide *Fawtry v. Fawtry*, Salk, 36. and *Blackborough v. Davis*, ibid. 38. and vide 3 Salk, 21.

1807.

The KING
against
The Inhabitants of
HORSLEY.

of it from the death of the intestate; yet it cannot operate by relation for a purpose perfectly collateral to the purposes above mentioned, and which is indeed, legally, an impossible one; viz. for the purpose of rendering her not removable at a time past, when, as far as the letters of administration are concerned, she was removeable for want of them; and when any order which might have happened to be made for her removal, (as no letters of administration then existed,) could not, as was held in *Rex v. Widworthy*, be quashed afterwards upon the subsequent grant of them. It remains therefore to be considered, whether upon any other ground than the relation of the letters of administration to the death of the intestate, and the vesting of the leasehold property thereby in the administratrix, she can be held to have been irremovable, during the former part of her residence prior to the grant of administration: which comes at last to this question, whether a person can, *for this purpose*, become the owner of a chattel real, which had belonged to the intestate, before the actual grant of administration to such person? It will be recollected, that, upon the death of her mother-in-law, the pauper became *sole* next of kin to the intestate: it was in her power, therefore, at any moment afterwards to have clothed herself exclusively with the legal character and rights of an administratrix. Lord *Mansfield*, in *Rex v. Cold Ashton*, observes that there is “a great difference between a *sole* next of kin, and where several persons in equal degree have all of them (as in that case they had) an equal right.” In *Rex v. North Curry*, Lord *Mansfield* again observed, that the widow (the pauper in that case) “was not properly, and in the sense “of the cases, the *sole* next of kin;” thereby intimating what would have been his opinion if the pauper had been *sole* next of kin. The effect, however, of a 40 days’ residence by a sole next of kin has never yet received a judicial decision. The circumstance occurred indeed, in point of fact, in the case of *South Sydenham v. Lamerton*, 1 Str. 57; but it was argued and decided on a different ground. Adverting to the intimation given by other judges, of what would be their opinion upon such a case as the present, if it should come before them, and to the reason of the thing: according to which the exclusive right to enforce the proper means of acquiring a legal title to the property, coupled with the actual enjoyment of it in the mean

[411]

mean time through the occupation of a tenant, gives so much colour of right to reside, without being removed, within the parish in which the property is situate, as to exempt such residence from being considered as a vagrant intrusion into a parish in which the party has nothing of *his own*, within the purview and scope of the poor laws; and to the determinations thereupon; we are of opinion, that in a case in which the language of no statute upon the subject precludes us from so determining; and where no principle of convenience, nor any decided case, is contravened by such a determination; we are well warranted in considering that a settlement was gained by a residence of 40 days within the parish in which a pauper, thus circumstanced in respect to real property there situate, resided; and of course that the order of Sessions, discharging the order of removal, must be affirmed.

1807.

—
The King
against
The inhabitants of
HORSLEY.

[412]

BIRCH *against* TRISTE.

Saturday,
May 9th.

LORD ELLENBOROUGH C. J. delivered the opinion of the Court in this case: which had stood over some days for consideration.

This was a rule obtained early in this term, on the part of the defendant, calling on the plaintiff to shew cause why the execution issued and executed in this cause should not be set aside, on the ground that the same was irregular; it having been sued out after a writ of error allowed and bail put in: or if the Court should be of opinion that, under the circumstances, the writ of error was not a superseades, still that the plaintiff ought not to have sued out execution without having first applied to the Court for leave so to do. On shewing cause against the rule the facts appeared to be these: that the defendant in *Michaelmas* term last sued out a writ of error on a judgment obtained against him in this Court, and had the same allowed, and served it on the plaintiff; but having failed in perfecting his bail in error in time, he afterwards nonprossed his own

Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same court is not a supersedeas of execution as the first is: and execution may then be sued out without leave of the Court. But in error of matter of fact coram vobis, which

is not within the statutes requiring bail in error, the writ of error is or is not a superseades according to circumstances; and the Court must be moved for leave to sue out execution pending it,

writ

1807.

BIRCH
against
TRISTE.
[413]

writ of error; and then sued out a new writ of error, got the same allowed, and perfected his bail: and afterwards the plaintiff, not regarding this second writ of error, issued his execution on the judgment, without applying to the Court for leave. As to the first point, no authority has been shewn that a second writ of error sued out *in the same Court* has ever been held to be a supersedeas, where the first writ of error abated or was put an end to by act of the party, the plaintiff in error. On the contrary, there is a settled distinction between the case of a writ of error abating by the act of the party, and of one abating by the act of God, or by a circumstance which the plaintiff in error could not control: in the first case, the plaintiff in error shall not by means of a second writ supersede the execution of his adversary; for that would be to enable him at his own pleasure to prolong the delay: in the latter case, it is reasonable that he should not be prejudiced where he has not been guilty of laches; as where the writ has abated by death of the party or of the chief justice. Several authorities warrant this distinction. In *Sir Francis Duncombe's case*, 1 *Mod.* 285. it was held that if a writ of error abate in parliament, or the like, and another writ of error be brought *in the same Court*, it is no supersedeas. *Hartop v. Holt*, 1 *Salk* 263, is to the same purpose. There after writ of error in the Exchequer-chamber, on a judgment in debt in the King's Bench, and that judgment affirmed, the plaintiff sued out a *sci. fa.* in B. R., and had an award of execution; on which the defendant brought a writ of error in the Exchequer-chamber, *tam in redditione judicii quam in adjudicatione executionis*: notwithstanding which the plaintiff went on, and sued out execution. And a motion was made to set it aside, because it was sued out when there was a writ of error depending. And by *Holt C. J.* there can be no new writ of error after the justices and barons have affirmed or reversed. If a plaintiff in error be nonsuit, he shall not have a new writ of error. And the Court held that what the plaintiff had done was well, and no contempt; for the writ of error could be no supersedeas to the execution. In *Buller v. Lusitano de Pinna*, 2 *Stra.* 880. a writ of error brought by a feme sole abated by her marriage; and then she and her husband brought a second: and the Court gave leave to take out execution; it being a delay occasioned by the act of the plaintiff in error. The case of *Jenkins v. Bates*

[414]

1807.

—
BIRCH
against
TRIESTE.

is very shortly reported in 2 *Str.* 1015.; but we have seen a fuller note of it to the same effect from Mr. *Ford's MS.* According to that note it appears, that the plaintiff brought a writ of error on a judgment in C. B. as a feme sole: and the defendant sued out a sci. fa. to assign errors; which were assigned by the plaintiff and her husband. The defendant pleaded in nullo est erratum; and then moved for leave to take out execution; insisting that by the marriage the suit was abated. The plaintiff insisted, that though the suit were abated, yet the Court should give time to bring a new writ of error, which would be a supersedeas to the execution. The Chief Justice said, the abating the writ is the act of the party: here is nothing to hinder the defendant from taking out execution: and as the plaintiff has voluntarily defeated her own writ, she may thank herself, and the defendant must take out execution. These authorities have settled the point, that a second writ of error brought in the same Court is not a supersedeas, as the first is. The remaining question is, whether, that being so, the plaintiff below be obliged by the practice of the Court to apply to the Court for leave to take out execution? And if it be clear, as we think it is, that after the first writ of error has been put an end to by the act of the plaintiff in error, he cannot supersede or stay the defendant's execution by a second writ of error brought in the same Court; there is no reason to oblige him to apply to the Court for leave to sue out his execution; which can only occasion further expence and delay, and may tend to deprive the original plaintiff of the fruits of his judgment: although in a questionable case it may be a prudent measure for the defendant in error to apply to the Court for leave before he sues out his execution. In *Lane and others v. Bacchus*, 2 *Term Rep.* 44. the Court refused to set aside an execution sued out before, but executed after, the allowance of a writ of error served on the sheriff and the party; the plaintiff in error not having regularly put in bail. In error of matter of fact coram nobis, which is not within the statutes requiring bail in error, the writ of error is not of itself a supersedeas in the first instance; but is or is not so according to circumstances; and those circumstances the Court will inquire into, on motion for leave to take out execution: in case, therefore, of error brought

[415]

1807.
 —
 BIRCH
 against
 TRISTE.

[416]

brought coram nobis, the practice is that the defendant in error shall move the court for leave to take out execution. That is so laid down in *Ribout v. Wheeler, Sayer* 166. It was a motion to set aside a fieri facias: a writ of error coram vobis had been brought, and allowed, and notice of the allowance served on the plaintiff's attorney before the fieri facias sued out; which was sued without leave; and which writ of error was not determined. The Court made the rule absolute. And *Denison J.* said, (*Ryder C. J.* and *Wright J.* absent), before a writ of error coram vobis, it not being a writ of right, is allowed, there must be an affidavit of some error in fact; by which, in case the fact to be assigned for error is true, the plaintiff's right of action will be destroyed. A writ of error coram vobis is not a superseas in itself (a): but although it be not, execution cannot be taken out on the judgment whilst it is depending, without leave of the Court. It would be very unreasonable that it should be in the power of the plaintiff to take out execution upon the judgment, without leave of the Court, whilst a question is depending concerning a fact, by which if it be true, the plaintiff's right of action will be destroyed. This reasoning does not apply to the case of a writ of error within the statute, where the plaintiff has had, or might have had, the benefit of it as a superseas, but for his own act in determining it. We are, therefore, of opinion, that there is not any irregularity in the suing out of the execution, and that the rule obtained for setting it aside must be discharged.

Rule discharged.

(a) Vide, *Carth.* 368, 9.

1807.

The KING *against* PALMER and Another.*Monday,
May 11th.*

A Mandamus was prayed for to the defendants, justices of the peace for the county of *Wilts*, commanding them to appoint two or more overseers of the poor within that part of the parish of *Wokingham* which lies in *Wilts*; the object of which was to bring in revision the opinion of the Court pronounced in the case of *Lane v. Cobham (a)*. *The affidavits in support of the application stated, that the parish of *Wokingham* is about 5 miles in length, 3 in breadth, and 18 in circumference; situated in the counties of *Wilts* and *Berks*, and subdivided into the corporate town of *Wokingham*, in *Berks*, the *Berks* liberty, and *Wilts* liberty, without the corporation; each of which three districts had (previous to 1774) immemorially maintained their own poor separately, with separate overseers, rates, and accounts. That there had been removals of paupers from each of these districts to the other, and certificates from one to the other now existing from 1696 to 1772. That there is one church only, which is situated in the *Wilts* liberty; but three churchwardens, one out of each district, appointed at the consistory court of the dean of *Sarum*. That two constables are appointed for the town of *Wokingham* by the corporate magistrates in sessions, according to their charter; one constable for the *Berks* district, appointed at the court leet for the hundred of *Sonning* in *Berks*; and another constable, by the *Wilts* magistrates in session, for the *Wilts* district. That previous to 1774 there were always appointed two overseers for the town, two for the *Berks* liberty, and either one or two for the *Wilts* liberty; but about that time the town and the *Berks* liberty agreed to have only three overseers between them, two for the one and one for the other, alternately in each year; and since that time only one overseer has been yearly appointed for the

Although a parish might not have had the benefit of the stat. 43 *Eliz. c. 2.* before and at the passing of the stat. 13 & 14 *Car. 2. c. 12.*; but perhaps at that period and certainly for a long course of years antecedent to the years 1773-5 maintained its poor in separate districts; yet it was competent to the parishioners at the latter period to cease acting under the statute of *Car. 2.* and to recur to the general provision of the stat. 43 *Eliz.* by maintaining their poor as one entire parish: and having so done from the year 1775, the Court refused a man- before that

damus to the justices of the peace to appoint separate overseers as time.

*[417]

(a) 7 *East*, 1, where the same question arose as in the present case.

1807.

The KING
against
PALMER
and Another.
*[418]

Wilts liberty. That in 1774 a mandamus (a) issued to the churchwardens and overseers of the parish* of *W.* in *Berks* and *Wilts*, to make an equal and entire rate, which was never argued; since which a joint rate has been made for the "town and parish of *Wokingham*," as the rates are entitled; but still the overseers in each district continue to collect their several proportions of the rate separately, and keep separate accounts of their expenditure, and confine their relief to the poor in their respective districts. That the *Wilts* liberty is a township, and has never had jointly with the other two districts the benefit of the stat. 43 *Eliz.* c. 2. It further appeared that the town was incorporated by two charters, one of the 25th of *Elizabeth*, granted to the town of *Wokingham* in the county of *Berks*; the other of the 10th *Jac.* 1., to the town of *Wokingham* in the counties of *Berks* and *Wilts* in our lordship of *Souning*. That the *Berkshire* part is in the hundred of *Souning*, and the *Wilts* part of *Wokingham* in the hundred of *Amesbury*. That amongst the corporation muniments, in the custody of the town clerk, are many bonds of indemnity granted by individuals to indemnify the several divisions of the parish from probable charges: six of them dated from 1613 to 1640 (b) are made to indemnify the town and parish of *Wokingham* in the counties of *Berks* and *Wilts*. Sixteen of them, dated from the 43 *Eliz.* to 1716, are to indemnify the town and parish of *Wokingham* in the county of *Berks*; two bonds, dated in 1657 and 1698, are to indemnify the parish of *Wokingham* in the county of *Berks*: and eighty-two bonds, dated from 1606 to 1773, are to indemnify the town of *Wokingham* only; of which latter some are granted to the alderman of the town, others to the alderman and overseers of the town. That there are many certificates

[419]

(a) It was stated by mistake in *Lane v. Cobham* that the form of the mandamus was to the justices to appoint four overseers for the whole parish: but the legal inference, as it applied to the argument, was the same.

(b) The particular dates of these appeared by the affidavits against the rule to be the 19th *May* 1613. 13th *March* 1637. 4th *January*, 13 *Car.* 1. 6th *April* 1639. 1st *November*, 14th *Car.* 1.; and 11th *July* 1640; the last five of which were made to the alderman of the town.

granted

1807.

The KING
against
PALMER
and Another.

granted by each of the three districts to one of the others; in some of which the fact of their maintaining their poor separately is stated. Nine of these from 1705 to 1769 granted by the churchwardens and overseers of the poor of the corporation of *Wokingham*, in the county of *Berks*, to the churchwardens and overseers of the poor of *Wokingham*, in the county of *Wilts*. Fourteen others, from 1705 to 1748, from the churchwardens and overseers of the poor of the parish of *Wokingham*, in the county of *Berks*, to the churchwardens and overseers of the poor of the parish of *Wokingham*, in the county of *Wilts*. Four others from the parish of *Wokingham*, in the county of *Wilts*, to the town of *Wokingham*, in the county of *Berks*, dated from 1706 to 1764. And two others from the parish of *Wokingham*, in *Berks*, dated 1705 and 1748. And also an order of removal from the *Berks* to the *Wilts* part of the parish, confirmed on appeal in the 12th of *Anne*, was set forth. That prior to 1774, according to information and belief, the three districts maintained their poor separately by separate rates, of which one was specifically referred to as far back as 1725, and others afterwards. And that the parish has always been subdivided, and has not had the benefit of the stat. 43 *Eliz. c. 2.*; and that the *Wilts* part maintained its own poor separately at the time of passing the stat. 13 & 14 *Car. 2. c. 12.*

The affidavits in answer to the rule stated in addition, that the *Wilts* part of the parish, consisting of about a fourth, was an insulated part of that county, about 40 miles distant from the body of it, in which part the only parish church was situated; and the whole parish is within the jurisdiction of the Dean of *Sarum*. That by the information of old persons now dead (one of them above 40 years) the whole parish had formerly maintained their poor jointly; but had been separated into three districts by the influence of three leading men, (one of whom was mentioned;) and so continued till it was united again in 1775, after the granting of the *maudamus*. That the following entry appears in the parish books; "*July 11th, 1775.* At a meeting of the parishioners of the *Wiltshire* part of the parish, held this day in the vestry of the parish church, we the undermentioned persons do consent and agree to become one parish with the town of *Wokingham* and the *Berkshire* part of

[420]

1807.

—
The KING
against
PALMER
and Another.

the parish, and to give up an equal proportion of the money now in hand to the other respective overseers for the use of the year ensuing." (Signed by several of the inhabitants.) That since *July* 1775 one general rate has been made for the whole parish; and it has been customary for the respective officers to collect such portion of rates as were charged in the district for which they had been respectively appointed, and to pay the poor residing in their respective districts who required occasional relief: but from that time there has been one general poorhouse or workhouse for the use of the whole town and parish, which has been maintained by each of the respective overseers of the several districts, alternately, for a month at a time; except that the *Wilts* part being the smallest, the other two have generally paid the rent for the poorhouse, and provided the linen, furniture, and fuel for the same. That the overseers within each district have kept separate accounts, which are regularly entered in the parish books; and at the end of each year have regularly accounted to each other, and have paid over each to the other the balances as their accounts required; the town overseers generally receiving a considerable balance from the other districts on account of the excess of expenditure beyond the amount of rates collected within that district. That a rate of 1s. in the pound averages in the town 80*l.*, in the *Berks* district 130*l.*, and in the *Wilts* district 58*l.*; and that the whole town and parish have reaped the benefit of the stat. 43 *Eliz. c. 2.* from 1775 to the present time, and that it may continue so to do.

[421]

The affidavits further stated, that in the ancient MS. book, intitled, *Wokingham Sessions Book*, found amongst the muniments of the corporation, containing entries of the Quarter Sessions from 1630 to 1748, there is this entry: "*Berks, ss.*—At a session of the peace held at *Newbury* in the said county on the 3d of *April* 1638, upon the petition of the aldermen, burgesses, and other inhabitants of *Wokingham*, shewing that at the Quarter Sessions, holden at *Newbury* on the 6th of *October* 1635, it was ordered, that all the inhabitants of *Wokingham* aforesaid, as well as those within the liberty of the town as those of the parish, should join together in all taxes and rates for the relief of the poor; which the inhabitants of the parish do utterly refuse

to

1807.

The KING
against
PALMER
and Another.

[422]

to do: now, upon the petition of the said aldermen, burgesses, and inhabitants, shewing that the parishioners of the said parish without the said borough do make such refusal as aforesaid; it is ordered in open court, that the said former order be confirmed. And if the said inhabitants of the said parish without the said borough do refuse to join with the inhabitants of the said borough towards the relief of the poor of the said parish, the next justice of peace is desired by the Court to bind them over to the next Sessions to answer their contempt therein," (Signed by the clerk of the peace). That a separate rate made for the relief of the poor of the *Berks* part of the parish in 1762 was quashed by the county Quarter Sessions at the *Epiphany* Sessions 1773 on appeal; on the ground, as was believed, that the rate was not made for the whole parish. And that it was quashed for that reason; and that the question whether the parish could have the benefit of the stat. 43 *Eliz. c. 2.* was then fully discussed, was believed, because it so appeared by one of the briefs held by the counsel for the appellants at the sessions, (which was now produced in court) out of the custody of the grandson of the then appellant's attorney in the cause. And from the statement in that brief it appears that much evidence then existed respecting the whole of the parish having formerly been rated together, which does not now exist: and it is there stated, that the first separation was in 1643. That since the mandamus in 1774 a rate has been made for the whole parish; but it has been the practice of the overseers within the respective jurisdictions to take bonds of indemnity to themselves alone, without naming the other overseers. There were also various entries stated on the affidavits of the proceedings of the inhabitants of the parish in respect of the appeal; the result of which appeared to have ended in an agreement between the town and the *Berkshire* part, after the separate rate of the latter had been quashed at the sessions, to unite in making a joint rate in future; and an invitation by them to the *Wilts* part to join them, which was after some time acceded to, as before stated.

Garrow and *Dampier* shewed cause against the rule, and argued upon the evidence, as preponderating in favour of the supposition that the inhabitants of the three districts acted as one parish at the time of passing the stat. 13 & 14 *Car. 2.* But that

[423]

1807.

—
The KING
against
PALMER
and Another.

whether they did so or not was immaterial, if it appeared now that they were capable of enjoying the benefit of the stat. 43 *Eliz.*; which they said was sufficiently evident from the fact of their having enjoyed that benefit for the last 30 years. That the words of the stat. of *Charles 2.* reciting, that the inhabitants of several counties, by reason of the largeness of their parishes, “have not, *nor cannot*,” reap the benefit of the 43 *Eliz.* looked prospectively, as well as to the time past. And that it was competent to a parish at any time when it found it expedient so to do, to revert to the general mode of providing for its poor pointed out by the 43 *Eliz.*; although at some antecedent period it might have provided for them in separate villis under the 13 & 14 *Car. 2.*

The Attorney General and *Park*, in support of the rule, argued upon their view of the evidence, as confirming the supposition that the parish had always maintained its poor in separate districts down to the year 1775, and that they could not have the benefit of the stat. 43 *Eliz.*; and in effect never had received it; since even now the overseers divide their labours according to the several districts. That the stat. 13 & 14 *Car. 2.* meant to legalize the practice of those parishes which before and at that time maintained their poor in separate districts; and was not intended to operate prospectively; still less to authorize a fluctuating system of providing for the poor, either in districts or as an entire parish, according to the shifting opinions of the day; which must necessarily be attended with great inconvenience. And that if a parish had once begun to act, as this parish had done for a long course of years, both before and at the time of passing the stat. 13 & 14 *Car. 2.* under that act, it was not competent for the inhabitants by any agreement to revert back again to the provisions of the stat. 43 *Eliz.*; even, if it appeared, which they contended it did not in this case, that they might conveniently maintain their poor, as one entire parish. And they cited Lord *Kenyon's* opinion in *Rex v. Leigh (a)* and other cases there referred to.

Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment. This was an application for a mandamus to appoint separate over-

(a) 3 *Term Rep.* 1746.

seers for the three several districts and divisions within the parish of *Wokingham*, in the several counties of *Berks* and *Wilts*, under the stat. 13 & 14 *Car. 2. c. 12. s. 21.*, upon the alleged ground, that the inhabitants of that parish “*had not nor could*” reap the benefit of the stat. 43 *Eliz.* Whether the parish had or could have the benefit of the stat. 43 *Eliz.* at the time of the passing of the stat. 13 & 14 *Car. 2.* appears doubtful upon the evidence laid before us in the affidavits on both sides. From the bonds of indemnity given by one part of the parish to another during the early part of the 17th century, prior to the year 1638, it is clear that the whole parish did not then maintain its own poor, jointly and *as a parish*. In the year 1638, which is a period, nearest to the year 1662, the date of the stat. 13 & 14 *Car. 2.*, it appears that the sessions made an order for a joint rate; and if that order were obeyed, (as in the absence of contrary evidence it may be presumed to have been,) the mode directed by the stat. 43 *Eliz.* was more likely to have been acted under at and immediately after the time of passing the statute of *Charles*, than any other less authorized mode of maintaining their poor. But supposing it were otherwise in point of fact, and that the parish at the time of passing the statute of *Car. 2.* was not in a situation conveniently to reap the benefit of the stat. 43 *Eliz. i. e.* by the joint management of not more than four overseers in the whole; and supposing the poor to have been immediately *thereafter* maintained in three separate districts and divisions, as it is now sought that they should be; the question is whether it were not competent to the parish, if they found it were convenient so to do, to cease acting under the stat. of *Charles 2.* and to recur to the provisions of the stat. 43 *Eliz.* There is nothing in the language of the act which imports that parishes were in this respect then immediately to adopt that mode of maintainance for their poor from which they should not afterwards be at liberty to depart. No decided case has excluded this provision from receiving a prospective construction. The words “*have not*” were of themselves sufficient to cover any then actually existing case in which parishes did not reap the benefit of the stat. 43 *Eliz.* The word “*cannot*,” though in its strictest grammatical sense it applies properly to present time, yet fami-

1807.

—
The KING
against
PALMER.
and Another.

[416]

1807.

—
The KING
against
PALMER
and Another.

[426]

liar instances occur in which the word is used prospectively: and as the varying circumstances of parishes may make the provisions of the statute of *Car. 2.* as necessary in respect to future cases, as those which existed at the time of passing the act, we think sound construction requires that it should be deemed applicable to both descriptions of cases. The language of Lord Kenyon in *Rex v. Leigh*, 3 *Term Rep.* 746., which goes furthest on this head, is rather applied to the expedient exercise of the discretion of the Court, than to its legal power in this particular. Speaking of the time of passing the statute of *Car. 2.* he says, "if the parish were properly divided at that time, nothing which has happened since will induce us to make any innovation." And Buller Justice in the same case considers the discretion of the Court, in assisting parishes to act under the one statute or the other, as fit to be governed by considerations of convenience and policy, and not as concluded or bound down by the actually existing practice at or immediately after the passing of the statute of *Car. 2.* According to the construction of the statute now adopted by us, the word *cannot* must be read as *may not*; and the words "shall after the passing of this act be maintained," &c. must be understood, not merely as imperative in respect to the then existing cases, but as applicable to other parishes also which in future might be similarly circumstanced; and as ceasing to be imperative when any parish might reap the benefit of the stat. 43 *Eliz.* Considering it therefore as a question open for our discretion, whether we will grant a mandamus for the purpose of introducing a different mode of managing the maintenance of the poor than that which has obtained in this parish without all question, for the last 32 years, and probably even at and after the time of passing the statute of *Car. 2.*; we cannot in this case discover any such preponderating reasons of convenience or policy as should induce us in the exercise of a sound discretion so to interfere: and in the absence of such reasons, we think that the rule nisi which has been obtained in this case should be discharged.

1807.

HAWKES *against* HAWKEY.Monday,
May 11th.

THE plaintiff declared in slander; and after the usual prefatory allegations of his prior good conduct and reputation, stated that before the speaking and publishing of the false malicious and defamatory words in the four last counts mentioned he had in due manner put in his answer upon oath to a certain bill filed against him in the Court of Exchequer, by the defendant, and that he had never been guilty, nor until the speaking and publishing the defamatory words, &c. had been suspected of perjury, &c. Then in the 5th and 6th counts, on which the question arose, the plaintiff declared, that the defendant further intending, &c., in a certain other discourse which he had with one *R. W.* the plaintiff's servant, falsely and maliciously spoke and published to the said *R. W.*, of and concerning the plaintiff, in the presence and hearing of divers other subjects, &c. these words: *I (the defendant) have no doubt you (R. W.) will forswear yourself, as your master (the plaintiff) has done before you (R. W.); (meaning and insinuating thereby that the plaintiff had perjured himself, in what he had sworn in his aforesaid answer to the bill so filed against him as aforesaid.)* The 6th count laid the words spoken by the defendant to the said *R. W.*, the plaintiff's servant, thus; *your master (meaning the plaintiff) has both cheated people out of their wages and forsworn himself; (thereby meaning and insinuating that the plaintiff had perjured himself in the aforesaid answer so put in by him to the bill so filed against him as aforesaid);* by means of which scandal the plaintiff had been suspected, and believed to be guilty of perjury, and divers had refused * to have any dealing, &c. with him as before, &c. After verdict for the plaintiff, with general damages,

In slander the plaintiff averred that, he had in due manner put in his answer on oath to a bill filed against him in the Court of Exchequer by the defendant, (but did not proceed to aver any colloquium respecting that answer, with reference to which the words were spoken;) and then alleged that the defendant said of him that he was forsworn; innuendo, that the plaintiff had perjured himself in what he had sworn in his aforesaid answer to the bill so filed against him: held that this innuendo of the sense of the declaration to have been put in.

nuendo could not, without the aid of such a colloquium, enlarge the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in.

*[428]

1807.

—
HAWKES
against
HAWKEY.

Owen moved, in last *Michaelmas* term in arrest of judgment: 1st, in respect to the charge of being *forsworn*; that although it is stated in the prefatory matter that the plaintiff, before the slanderous words spoken, had put in his answer upon oath to a bill filed against him in the Court of Exchequer; yet there is no colloquium or introductory averment that the words were spoken of him with reference to any judicial proceeding; without which the words themselves, according to *Holt v. Scholfield* (a), are not actionable. And this defect cannot be supplied by the innuendo, (meaning that the plaintiff had perjured himself in what he had sworn in *his aforesaid answer* to the bill so filed against him as aforesaid;) for the office of an innuendo is only to explain, but cannot enlarge the meaning of the words spoken, without the aid of an introductory averment. *Rex v. Horne* (b). 2dly, That the same objection applied to the 6th count: the imputation of cheating people out of their wages is not actionable, without an averment that the words were spoken of the plaintiff in his trade or profession, or shewing some special damage. *Davis v. Miller* (c), and *Todd v. Hastings* (d).

[429]

Sir *V. Gibbs* and *Marryat* shewed cause, and contended that the words spoken were connected with the introductory matter by means of the innuendo; which differed this from the other cases cited, where there was no introductory matter to which the innuendo could apply. The innuendo did not introduce the new matter, but only referred to it; which was the proper office of such an innuendo. If upon the evidence it had appeared that the words spoken had no reference to the plaintiff's answer filed in the Exchequer, the innuendo would have been disproved, and the plaintiff could not have recovered. But though the reference of the slanderous words to the plaintiff's answer in the Exchequer may be informally stated in the declaration, the informality is cured by the verdict. For in order to support the verdict it must have been proved, pursuant to the

(a) 6 *Term Rep.* 691.

(b) *Coup.* 684. referring to *Barham's case*, 4 *Rep.* 20, a.

(c) 2 *Str.* 1169.

(d) 2 *Saund.* 307.

1807.

HAWKES
against
HAWKEY.

allegations of the declaration, that there was such a bill filed in the Exchequer,* to which the plaintiff had put in his answer on oath; that the words laid were spoken, and that they referred to that answer, without which the innuendo, that by such words, with reference to such answer, the defendant meant to insinuate that the plaintiff had perjured himself, would not have been proved. And it was not necessary to state a colloquium; because it would not have been necessary to have proved it in fact. It is sufficient, after verdict, if the words may mean what the innuendo imputes them to mean, with reference to the introductory matter stated on the record. In the case of *Savage v. Roberts (a)*, the words spoken were not actionable, unless spoken of the plaintiff in his trade; and that could not be inferred from the mere circumstance of calling himself a *trader*: but here the words are actionable if spoken with reference to a suit in Court; and there is an introductory averment that there was such a suit; and the innuendo contains an averment that they were spoken of that suit. They mentioned also *Tindal v. Moore (b)*, where no colloquium was thought necessary.

[430]

Dauncey and *Owen*, in support of the rule. The cases before cited shew that the words themselves are not actionable, unless by proper averments they are shewn to impute perjury in some cause in Court; for which purpose four links are necessary. 1. The fact of such answer upon oath by the plaintiff to the bill filed in the Exchequer. 2. That there was a colloquium about it; with reference to which the words were spoken. 3. The words themselves. 4. The innuendo that the defendant meant by those words to impute perjury to the plaintiff, in that answer which he had put in, and concerning which the colloquium was had. It is not enough that there was such a judicial proceeding; but it must expressly appear by a distinct averment upon the record that the words were spoken with reference to that judicial proceeding; and not by way of innuendo, which need not be proved: and the jury cannot find that fact unless it be judicially submitted to them. This is expressly

(a) *Salk*, 694.(b) 2 *Wils.* 114.

1807.

—
HAWKES
against
HAWKEY.

[431]

laid down in *Rex v. Horne* (a): And in *Ludwell v. Hole* (b), *Davis v. Miller* (c), and *Holt v. Scholefield* (d), judgment was arrested for want of a colloquium. It may be said however, that in the last-mentioned cases there was no introductory averment to which the innuendo could refer; but that will not apply to *Savage v. Robery* (e); for there the plaintiff averred that he was a trader; but for want of a colloquium that the words were spoken of him in that character, without which they were not actionable, the judgment was arrested. The innuendo in this case enlarges the natural sense of the words spoken; which it cannot do without the aid of an averment to introduce the new matter, and a colloquium to refer the words spoken to such new matter; and the innuendo is no averment in itself. They also referred to *Rex v. Greepe* (f), *Thomas v. Axeworth* (g), *Miles v. Jacob* (h), *Harvey v. Duckin* (i), and *Fleetwood v. Curley* (k); in which latter there was an averment that the king had made the plaintiff general receiver of the court of wards, and that the defendant spoke certain words of the plaintiff, charging him with deceiving and cozening the king: but there was no averment of a colloquium about his office: and it was agreed that if the plaintiff had added an innuendo, that the deceit was in his office, it would not have availed: but ultimately they agreed that the words in themselves imported as much.

Lord ELLENBOROUGH C. J. The only question is whether this can be cured by verdict; for nothing can be more clear than the rule laid down in the books, and which has been constantly adopted in practice, not only where the words spoken do not in themselves naturally convey the meaning imputed by the innuendo, but also where they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable; it must not only be predicated that such matter existed, but also that the words were spoken of

(a) *Cowp.* 684, &c.(c) 2 *Str.* 1169.(e) *Salk.* 694.(g) *Hob.* 2.(i) *Ib.* 45.(b) 1 *Str.* 696.(d) 6 *Term Rep.* 691.(f) *Salk.* 513. and 1 *Ld. Ray* 256.(h) *Ib.* 6.(k) *Ib.* 268.

1807.

HAWKES
against
HAWKEY.
*[432]

and concerning that matter. As Lord C. J. *De Grey* says in the case of *The King v. Horne*, speaking of *Barham's* case, where the slander was, "he has burned my barn;" the*plaintiff cannot say, by way of innuendo, "my barn full of corn;" because that is not an explanation of the words, but an addition to them. But, he adds, if in the introduction it had been averred that the defendant had a barn full of corn, *and that in a discourse about that barn, the defendant had spoken the words*, an innuendo that he meant, by those words, the barn full of corn would have been good. Lord C. J. *De Grey* does not say merely that the introductory averment, that the defendant had a barn full of corn, would have been sufficient to warrant the innuendo, but also that there was a discourse about that barn, in which the words were spoken. But if the first were sufficient, it was superfluous to mention the other. Now here one of the two ingredients necessary to found the innuendo is wanting. The prefatory allegation, that the defendant had put in his answer upon oath to a bill filed against him in the Exchequer, is right: but whether the words were spoken with relation to that answer does not appear; unless, after verdict, it must be taken that they were so spoken. Upon this point we will look into the cases. But if a broad rule has been laid down as to the mode of declaring in this species of action, whether properly laid down or not in the first instance, it is better to abide by it, than to attempt making nice distinctions. The only peculiarity in this case, which is relied on as distinguishing it from the current of authorities, is the preliminary matter averred respecting the fact of the plaintiff having before put in his answer to the bill filed in the Exchequer; and the question is, whether the innuendo alone will refer the words spoken to such introductory matter, so as to make it necessary for the plaintiff to prove every thing that would have been necessary to prove if a colloquium had been laid. The case of *Savage v. Robery* seems to shew that it will not.

[433]

The case stood over till this term, when his Lordship shortly adverted to the form of the declaration, as not containing any colloquium respecting the answer averred to have been put in on oath by the plaintiff to a bill filed against him in the Exchequer,

1807.

—
HAWKES
against
HAWKEY.

chequer, in which he was charged to be forsworn : nor any colloquium respecting the plaintiff's trade, &c. : but only an *inneundo* that the plaintiff had perjured himself in what he had sworn in *his aforesaid answer* to the bill so filed against him : which innuendo, it was contended, enlarged the sense of the words by reference to the fact of such an answer averred to have been put in : and might be considered as supplying the want of an colloquium, averring that the words were spoken with reference to that answer. But upon looking into the case of *The King v. Horne*, the Court, he said, were of opinion that this innuendo could not supply the want of such a colloquium.

Judgment arrested.

1807.

SHAKESPEARE *against* PHILLIPS.*Monday,*
May 11th.

ON the 7th of *May* 1805 the defendant in the action gave a cognovit for 70*l.* 7*s.* 6*d.*, the amount of the debt and costs, payable by instalments of 10*l.* every three months, the first of which was to be paid on the 6th of *July* 1805. On the 16th of *June* 1806 the judgment was perfected, and the bail became fixed. On the 21st of **July* following the last insolvent debtors' act passed for liberating prisoners in custody for debts before the 1st of *February* 1806; at which time the defendant being then in custody at the suit of another creditor,) three instalments were due; and in the *October* following the principal was discharged under that act, when five instalments had become due. On the 6th of *January* 1807, all the instalments were due. Proceedings were had against the bail; whereupon a rule was obtained, calling on the plaintiff to shew cause why an exonerator should not be entered on the bail-piece; the defendant having been discharged under the last insolvent debtors' act; and the bail having tendered the instalments on the cognovit which were due at the time they became fixed; and why the *capias ad satisfaciendum* issued against the bail of the defendant should not be set aside, and the plaintiff pay the costs; and 70*l.* paid into the sheriff's hands be returned to the bail.

Jervis and *Comyn* shewed cause against the rule, and stated the question to be whether the bail were liable to the debt sworn to and the taxed costs, or only to 30*l.* the amount of the three instalments which became due before the 1st of *February* 1806, the period of discharge to which the insolvent debtors' act referred: or to 50*l.* the amount of the five instalments due

Where the defendant in the action gave a cognovit for the debt and costs, payable by seven instalments; and after the bail were fixed an act passed for discharging insolvent debtors in custody for debts due at a certain day, prior to the bail being fixed; at which day three only of the instalments were payable; and afterwards the principal was discharged under the act, when only two more of the instalments had become payable; yet held that the bail were liable for the

whole condemnation money; the entire debt, quâ debt, being due instantaneously, with a stay of execution only for certain portions at certain times.

*[434]

1807.

SHAKE-
SPEARE
against
PHILLIPS.
[435]

at the time when the principal was actually discharged out of custody. They likened this to the case of the principal, become bankrupt (a), obtaining his certificate after the time when the bail are fixed; where the latter remain absolutely liable to the sum sworn to; though the principal be discharged. In like manner as a bankrupt's sureties are not discharged by his certificate (b); but have their remedy over against him for the amount of the debt paid by them after the bankruptcy; though the penalty of the bond were forfeited before (c). The bail engage either to render the principal, or to pay the condemnation money; which in this case is the whole debt, though time was given for payment; and not having done the one, they are necessarily answerable for the other; and the giving day of payment is in their favour. At any rate, however, the bail, if not liable for the whole, are liable for the five instalments which became due before the act passed; till when the plaintiff was entitled to have taken out his execution against the principal.

Marryat, contra, contended that the cognovit only authorized execution to be taken out against the principal for the instalments due from time to time; and that as the act of parliament had discharged him from all debts prior to the 1st February the bail were only fixed for 30*l.*, the amount of the three instalments then due: for the principal himself was not liable for more, and the bail was only to pay in default of the principal.

LORD ELLENBOROUGH C. J. The debt, quæ debt, was instantly due, both as against the principal and bail, but only with a stay of execution, according to the terms of the cognovit, for certain proportions till certain times. Then the undertaking of the bail is either to render the principal or pay the condemnation money: which is against them, when they be-

(a) *Woolley v. Cobbe and Another*, 1 Burr. 244. And *Cokerill v. Owston*, ib. 436.

(b) *Ex parte Williamson*, 1 Ath. 84.

(c) *Taylor v. Mills*: Cowp. 525.

came fixed, was the one entire sum of 70*l.*, only with the same dies dati given as in the case of the principal. 1807.

LAWRENCE J. It is not attempted to be argued that it was necessary to issue a new writ of *capias ad satisfaciendum* against the principal upon each instalment as it became due, in order to charge the bail.

SHAKE-
SPEARE
against
PHILLIPS.

Per Curiam,

Rule discharged.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

1807.

IN THE

Court of KING'S BENCH,

IN

Trinity Term,

In the Forty-seventh Year of the Reign of GEORGE III.

SMITH *against* WILSON.

Saturday,
May 30th.

THIS case came on upon demurrers to the 4th, 5th, and 6th pleas to an action of covenant upon a charter-party of affreightment; and was argued in *Easter Term** last by *Richardson* in the ship covenanted to take on board

at *London* the freighters goods, and proceed therewith to *Monte Video*, and there to deliver them to the freighter's agent, and receive from him another cargo and (wind and weather permitting) proceed therewith to his port of discharge in *G. B.*, and there deliver the same to the freighter, and end the said voyage. In consideration whereof the freighter covenanted to pay 670*l.* per month for freight, during the said intended voyage to *M. V.*, and back to her port of discharge; such freight to commence from the day the ship should be ready to receive her outward bound cargo, and to end when she should have finally discharged the whole; and also to pay two thirds of all pilotage and port-charges during the said voyage; such freight, pilotage, and port-charges to be paid on the arrival and discharge of the ship at her destined port in *G. B.*

In covenant by the owner for an alledged breach in non-payment of freight, pilotage, and port charges, it is not enough to shew that the ship, after having taken in a cargo in *G. B.* and proceeded part way on the voyage, but before her arrival at *M. V.*, was, without the default of the owner or crew, wrongfully seized and brought back to *London*, and there detained for some time till she was restored to the owner; in consequence of which she required repairs, which were done with all necessary dispatch; and that the owner was then ready and willing to cause the ship to prosecute and complete her voyage, and gave notice thereof to the freighter, and tendered him the ship properly fitted, &c. for that purpose, and requested him to give the necessary instructions in that behalf, and offered to observe the same, &c.: but that the

1807: in support of the demurrers, and by *Marryat* for the defendant
 — It was admitted that the 4th and 5th pleas were only intended to
 SMITH raise the question as to the validity of the declaration : and that
 against if that were good, the pleas were necessarily bad. But supposing
 WILSON. the declaration to be sufficient in itself, it was contended that the
 matter disclosed by the 6th plea was an answer to it ; setting out,
 as it did, certain proceedings in the Court of Admiralty, where
 the ship and cargo were libelled, which the defendant relied on,
 as furnishing a legal excuse to him for not re-shipping his cargo,
 which had been unshipped by the orders of that Court, so as to
 enable the plaintiff's ship to proceed with the cargo on the destined
 voyage ; but which plea the plaintiff contended to be merely
 argumentative and no answer to the breach assigned. It is un-
 necessary however to state the particulars of that plea, as the
 Court waved giving any opinion upon it, and decided the case
 wholly on the insufficiency of the declaration. The case stood
 over for consideration till this term, when

['439] Lord ELLENBOROUGH C. J. delivered the judgment of the
 Court. This was an action of covenant upon a charter-party of
 affreightment, made between the plaintiff, as agent of one *James
 Clarke of Baltimore*, owner of the ship *Portsmouth*, of the one
 part, and the defendant, the freighter, of the other part. The
 covenants on the part of the plaintiff were, that the ship, being

the freighter would not give any such instructions, &c. nor permit the ship to prosecute or complete the voyage ; but refused to do so, and wholly renounced the charter-party, and the further prosecution of the voyage, and wholly discharged the owner from further prosecuting or completing the voyage, and dispensed therewith.

For the freight (qua freight,) pilotage, and port-charges, are only covenanted to be paid by the freighter on the arrival and discharge of the ship at her destined port in G. B. ; and therefore such arrival and discharge, (which must be understood after the stipulated voyage performed,) are conditions precedent to the owner's right to freight, &c. And it is not enough to shew that the owner did all in his power towards earning the freight, &c. by the tender of his ship to complete the voyage, and his offer to obey the freighter's instructions ; because, though the owner had actually done, as far as lay in his power, all that he offered to do, and which the freighter discharged him from doing, it would only have amounted at most to an *endeavour* on his part to complete the voyage and earn the freight, &c. ; but such completion was still liable to be defeated by the act of God, or the accidents of the voyage ; and the performance of the condition which was to entitle the owner to freight, &c., would still have been *contingent*, although such his offers had been accepted by the freighter. Therefore this is not like the case where a party tendering to do that which he has undertaken, and which he has the *immediate* power of doing at the time, in order to entitle himself to a correspondent duty from another, is, by a refusal of that other to accept such tender, dispensed with averring performance of it, in an action for a breach in not performing the subsequent or concurrent duty.

properly

1807.

 SMITH
 against
 WILSON.

properly fitted, &c., should receive and take on board at *London* or *Portsmouth* at the option of the freighter, such goods as he might think proper to ship, and should sail and proceed therewith to *Monte Video*; and, being arrived there, should give due notice thereof to the agents of the freighter, and make a right and true delivery to them of all such goods, &c. as might be shipped as aforesaid; and, after such delivery, should receive and take on board from the freighter, his agents, &c., a full and complete cargo of lawful goods, &c., and having received the same, and being dispatched, should and would (wind and weather permitting) immediately set sail from thence, and proceed to some one port of discharge in *Great Britain*, agreeable to the directions the commander might receive from the said freighter his executors, &c.; and the said ship *being arrived at her destined port*, the commander should and would make a right and true delivery of the said cargo unto the freighter, his executors, &c. agreeably to the bills of lading that might be signed for the same, and there end his said intended voyage; (the act of God, the king's enemies, and all and every the dangers and accidents of the sea, &c. excepted.) The owner further covenanted that the ship should, if required, touch at the coast of *Africa*, on this side of the *Cape of Good Hope*, on her outward voyage to *Monte Video*, and take in passengers for that place, for whom water and provisions were to be provided and paid for by the freighter. In consideration whereof the defendant covenanted, that he, his executors, &c., would well and truly pay to the plaintiff 670*l.* sterling *per month*, for every calendar month the ship should be employed by him the freighter during her said intended voyage to *Monte Video* and back to her port of discharge: and so in proportion for any less time; in full for the freight or hire of the said ship during her said intended service; such freight to commence from the day the ship should be ready to receive goods on board at *Portsmouth*, and end when she should have finally discharged the whole of her said cargo; and also should pay two-thirds of all pilotage and port charges during the whole of the said voyage; and also two-thirds of all expences of stowing the said ship's cargo at *Monte Video*; such freight, pilotage, and port-charges, to be paid on the arrival and discharge of the said ship at her destined port in *Great Britain*. The declaration proceeds to state that the ship afterwards took on board at *Portsmouth* from the defendant, the freighter, such cargo as he thought fit to ship; and, being dispatched, proceeded on her outward

[440]

1807.

SMITH
against
WILSON.

[441]

voyage, and being required, touched at the coast of *Africa*, for the purposes in the charter-party mentioned; and that whilst she was afterwards prosecuting her outward voyage, and before her arrival at *Monte Video*, the ship, without the default of the plaintiff, the owner, commander, or crew, was, against their will, by force, wrongfully seized, taken and detained on the coast of *Africa*, by persons unknown, and by them sent and conducted to *London*, and was by those persons forcibly kept and detained for a long time afterwards, until she was liberated and restored to the plaintiff. That in consequence of the seizure, detention, and other circumstances stated, the ship, upon her liberation and restoration, required certain necessary repairing and refitting, to enable her to prosecute and complete the voyage: that the plaintiff caused such refitting and repairing to be done with all necessary dispatch: and that the plaintiff always, *from the time of the liberation, restoration, and refitting of the ship, was ready and willing to cause the ship to prosecute and complete the said voyage and gave notice thereof to the defendant, and, tendered and offered the ship to him to prosecute and complete that voyage, and requested him to give the necessary directions and instructions in that behalf, and to permit the said ship to prosecute and complete such voyage, and offered to observe such directions and instructions; and would have caused the ship to prosecute and complete that voyage; and avers that the ship was properly fitted, victualled and manned for the purpose; and that the defendant had notice of it.* The declaration further states that *the defendant did not, nor would give any directions or instructions respecting the ship, or the prosecution of that voyage; nor did, nor would permit the ship to prosecute or complete the same; but refused to do so, and wholly renounced the charter-party, and the further prosecution of the voyage, and wholly discharged the defendant from further prosecuting or completing that voyage, and dispensed therewith.* The plaintiff then proceeds to state that the ship was employed during the voyage in the charter-party mentioned for 12 months, and that *the freight thereof*, according to the rate of the charter-party, amounted to 8,040*l.*; and that the same ship would have been employed by the defendant, if he would have permitted her so to be during the further prosecution and completion of the voyage for other 12 calendar months; and that *the freight thereof*, at the same rate, would have amounted to other 8,040*l.*; and that two-third parts of the *pilotage and port-charges* of the ship, paid for and incurred by the plaintiff during the

[442]

the voyage, amounted to a further sum of 50*l.*: and then assigns a breach in the non-payment upon request of the freight, pilotage, and port-charges so claimed. To this declaration there were seven pleas pleaded on the part of the defendant; upon the three first of which issues were taken: to the 4th, 5th, and 6th, of which there were demurrers and joinders in demurrer: and to the 7th there was a special replication upon which issue was taken by the rejoinder.

The question in this case arises upon the demurrers and joinders in demurrer to the 4th, 5th, and 6th pleas: the substance of which pleas it is unnecessary to state, because assuming them to be bad in law, the defendant is nevertheless entitled to judgment, if the declaration be bad in substance, as it appears to us to be. The breach assigned is in the non-payment of what is claimed by the plaintiff, *eo nomine*, as *freight*; viz. 8,040*l.* at the charter-party rate of 670*l.* per month, for 12 months that the ship *was employed* during the voyage; and the like amount of the like rate for *freight* for other 12 months that the ship *would have been employed* by the defendant, (as alleged,) in the further prosecution of the voyage, if the defendant would have permitted her so to be. But, by the terms of the charter-party, the *freight, pilotage, and port charges*, thereby covenanted to be paid on the part of the defendant, are all of them expressly covenanted to be paid, “on *the arrival and discharge of the ship at her destined port in Great Britain* ;” and of course are made to depend on the event of such arrival and discharge at her destined port in *Great Britain*, as a condition precedent to the plaintiff’s right to demand the same. But it is argued on the authority of *Jones v. Barklay*, (*Dougl.* 685. last edit.,) and *Hotham v. The East India Company*, 1 *Term Rep.* 638, that the plaintiff, having done all in his power towards earning the freight, pilotage, and port-charges in question, by the tender and offer of his ship to complete the voyage, by his request of necessary directions and instructions, and his offer to obey them, &c.; and the defendant having, as alleged in the declaration, refused to give any directions or instructions for the ship, or the prosecution of the voyage, and having wholly renounced the charter-party, and the further prosecution of the voyage, and having discharged the defendant from further prosecuting or completing the voyage, and dispensed therewith; that the plaintiff had acquired the right to

1807.

SMITH
against
WILSON.

[443]

1807.

SMITH.
against
WILSON.

[444]

the sums demanded *as freight, &c.*, as completely as if the voyage had been performed, and the ship had arrived and been discharged at her destined port. But the decision of the Court in neither of the cases cited sustains the argument urged on behalf of the plaintiff in this exent. The most that can be understood to have been there decided is, (what was contended for by the plaintiff's counsel in the case of *Jones v. Barklay*,) that where a man "by doing a previous act would acquire a "right to a debt or duty; by a tender to do the previous act, if "the other party refuse to permit him to do it, he acquires the "right as completely as if it had actually been done." But the question still occurs whether, by actually doing the previous act tendered to be done in this case, the plaintiff would have acquired a right to the freight and other payments demanded? Here, if he had done all that he offered to do, and which the defendant discharged him from performing, still it would have amounted at most only to an *endeavour* on his part to prosecute and complete the voyage, and to procure, as far as in him lay, the arrival and discharge of her at her destined port: but the actual event of such an arrival and discharge did not depend upon him, nor was it within the reach of any efforts on his part to insure and to accomplish; but it was liable to be disappointed by the act of God, and all the various other accidents to which marine adventures are subject. But in the case put, (i. e. of *Jones v. Barklay*,) no contingency but the immediate death of the party tendering the act could have disappointed its performance; and, being done, the party doing it would have instantly acquired, without any further act, either on his own part, or on that of any one else, a full right by the terms of his contract to the duty demanded; which in that case was the payment, at a given time, of a sum of money stipulated to be paid him. So that the difference between the two cases is this; in the one, by doing an act in the power of the party to have done, he would have acquired a full and instant right to the duty demanded: in the other, by doing the act tendered to the full extent to which the party tendering was able to perform it, he would still have only taken certain steps of remote and uncertain effect *towards the attainment of the object and completion of the event necessary to be attained and completed*, in order to vest a right to the duty demanded in the party demanding it. The same in effect may be said of the case of *Hotham v. East India Company*

Company, 1 *Term Rep.* 638., where the *only thing* which stood in the way of the plaintiff's recovering the allowance claimed for short tonnage, according to the terms of his charter-party, (after having taken *all* proper steps on his part to obtain the necessary certificate to entitle him thereto,) was the neglect and default of the *Company's* own agents in refusing to afford him such certificate. Covenants of this kind have always received a strict construction. In *Bright v. Cooper*, 1 *Brownl.* 21. the covenant made by the merchant with the master of a ship, being to pay such a sum if he would bring his freight to such a port: and part of the goods being taken by pirates, and the residue brought to the place appointed and there unladed; the Court held that the merchant was not bound to pay the money to the master, because the agreement was not performed by him. And the late case of *Cook v. Jennings* in this Court (7 *Term Rep.* 381.) proceeded upon the same principle. Adverting therefore to the declaration only, and the breach therein assigned, we are of opinion, that as the ship never arrived at her destined port, within the terms of the charter-party, the freight claimed in the declaration never became demandable by law: and of course that the plaintiff cannot recover thereupon: which renders it unnecessary to consider the sufficiency of the several pleas demurred to, and the questions which might otherwise have arisen upon them.

Judgment for the Defendant.

IMGRAM and Others *against* MILNES.

Saturday,
May 30th.

IN debt the plaintiffs declared, 1st, upon a bond in the penal sum of 2000*l.* conditioned for the performance of an award to be made within a given time by certain arbitrators, to whom it was referred to arbitrate and determine "of and concerning

The submission being of *all matters* in difference between the parties, an award of so

much to be paid by the defendant to the plaintiffs on their *banking account*, and for which sum the plaintiffs were to give the defendant a release, is binding between them; for no other matter in difference between them shall be intended, unless it be shewn; and the award is good for so much, though the arbitrators also awarded a sum to be paid by the plaintiffs to the defendant out of a partnership fund in which others than the defendant were interested who were no parties to the submission.

1807.
—
SMITH
against
WILSON.
[445]

1807.

INGRAM
against
MILNES.

all and all manner of actions, suits controversies, &c. and demands whatsoever, at any time depending, &c. by or between these parties, and the costs and charges of any action, &c. then depending between them: and then the plaintiff's alleged an award made by the arbitrators within the time, by which (inter alia) they awarded that the defendant should at a certain day and place pay to the plaintiffs 472*l.* 4*s.* 2*d.* being the balance due on the banking account of the defendant with the plaintiffs; of which the defendant had notice: and then alleged a breach by non-payment of the money. There was another special count on the bond alone; and also general counts for money paid, money lent and advanced, money had and received, &c., and upon an account stated. To the 1st count there was a plea of no award, and to the others nil debet and a set-off were pleaded. At the trial before *Le Blanc J.* at *York*, the plaintiffs abandoned the special count on the award, and resorted to their general counts; and proved money advanced by them as bankers to the defendant on his separate account to the amount of 800*l.* In answer to this the defendant was driven to prove the award, in order to limit the sum to be recovered: but the plaintiffs contended that the award was bad, and consequently not binding upon them. And the question at the trial turned on the validity of the award; which, after stating the terms of the submission, as before mentioned, and that the arbitrators had examined and considered the allegations, witnesses, and evidence of all the said parties concerning the premises; proceeded to award that all actions and suits then depending between the parties should cease. That the defendant on the 1st of *October* 1805 should, at the plaintiff's bank in *Wakefield*, pay to them 472*l.* 4*s.* 2*d.* being the balance due on the banking account of the said *John Milnes* (the defendant) with the said plaintiffs. That the plaintiffs should pay unto the said *John Milnes* 116*l.* 2*s.* 8*d.* (the residue of a debt of 664*l.* 1*l.* 8*d.* due to him from *Milnes Lang* and *Wittaker* (a) from and out of the first monies which should be received by them on account of, or belonging to

[447]

(a) *Lang* and *Whitaker*, it appeared in the course of the cause, were partners with the defendant *Milnes*, and also had an account with the plaintiffs bankers in *Wakefield*, on their partnership account.

1807.

 INGRAM
 against
 MILNES.

the said *Milnes, Lang, and Whitaker*, together with interest, &c. That the plaintiffs should on the said 1st of October, carry to the credit of *Milnes, Lang, and Whitaker's* account with them four several promisory notes of 1000*l.* each, drawn by *Lang and Company*, payable to *Milnes, Lang, and Co.*; and which said notes were paid by *Milnes, Lang, and Whitaker*, to the plaintiffs; and should also place to the credit of the account of *Milnes, Lang, and Whitaker* all such sums as had been or should be received on the said notes. Then after stating other irrelevant matter, the arbitrators further awarded, that, upon payment of the said sum of 472*l.* 4*s.* 2*d.* as aforesaid, the plaintiffs should execute to the defendant a *release* in full of all claims and demands *for or in respect of the several sums included in the account upon which the said balance 472*l.* 4*s.* 2*d.* arose, &c.* It was admitted that the award was bad for so much as respected the payments to be made to the defendant by the plaintiffs *out of the partnership funds of Milnes, Lang, and Whitaker*, the two latter of whom were no parties to the award: and the learned Judge thinking that the sum awarded to be paid by the defendant to the plaintiffs might have been affected by the other accounts which the arbitrators had improperly taken into their consideration, rejected the evidence of the award as bad in toto, and the plaintiffs took a verdict for 800*l.* *Wood* therefore in the last term moved to have the verdict entered on the first or second count for 472*l.* 4*s.* 2*d.*, on the ground that the award was good for so much at least, though bad for the sums awarded to be paid by the plaintiffs to the defendant out of a fund belonging in part to other persons; and that the defendant might avail himself of that part of the award which fixed him with a certain debt to the plaintiffs on his own account, though he could not avail himself of that which was meant to be in his favour. A rule nisi was accordingly granted, against which

[448]

Topping and Littledale now shewed cause, and contended that the award was void in toto, inasmuch as it did not settle all matters in difference between the parties, which it was the object of the reference to accomplish. The arbitrators consider that something is due to the defendant from the plaintiffs upon the settlement of another account, but have awarded payment out of a fund over which they had no control; and their award consequently

1807.

INGRAM
against
MILNES.

[449]

consequently leaves the plaintiffs liable to be sued on that account; though it assumes to settle the balance due to them from the defendant *on his banking account*: and the release is only directed to be given by the defendant on that account: It is not therefore a mere excess of authority in the arbitrators; but like *Randall v. Randall* (a) the award is bad, because they have not made a final end of the suits and controversies between the parties, in pursuance of their authority. In answer to a suggestion from the Bench, that it did not appear there was any other than the *banking account* between *these parties*; they answered, that the contrary was to be collected from the arbitrators having directed the plaintiffs to execute a *partial* and not a *general* release; and that it was incumbent on those who now insisted on the award to shew that in fact there was no other account submitted to the arbitrators, if the fact were so. And there was no award of any release from the defendant to the plaintiffs.

Park and *T. Harrison*, contra, said, that the directions of the award were consistent with the state of the case, that there was no other than the banking account between these parties, though there were other partnership accounts in dispute between the plaintiffs and the defendant as one of the firm of *Milnes, Lang, and Whitaker*; the two latter of whom were no parties to the reference. The award therefore was final as between the present parties, and the release was properly ordered to be given in the form prescribed.

[450]

The Court said, that if it could be shewn that there was any other matter in difference between these parties than the banking account, the award could not be sustained in any respect; but they thought that it lay upon the party who impeached it to shew that there was some other matter in difference; and that otherwise they could not intend it, though the reference were of *all* matters in difference between the parties. If the award had been pleaded in bar to an action brought by the plaintiffs to recover the balance on their banking account, the plaintiffs must have replied that there were other matters in difference within the terms of the reference, on which no award had been made, in order to avoid the award. And here the plaintiffs having abandoned the special counts at the trial, and

(a) 7 *East*, 81.

1807.

 INGRAM
 against
 MILNES.

gone upon the general account; and the defendant having set up the award in evidence under the general issue; it was competent to the plaintiffs by way of reply to that evidence to shew any matter which made the award void. And *Lawrence J.* referred to 1 *Com. Dig.* tit. *Arbitrament*, E. 10, where it is said, that if an award recite that controversies were depending 29th of *January*, and it be made de et super præmissis of all matters till the 28th of *January*, it is good; for it shall not be intended, unless it be averred, that any matter was depending on the 29th of *January* which was not so on the 28th. And again; if there be a submission of *all* matters, ita quod fiat de præmissis; an award de promissis of a *single* matter is good; for others shall not be intended unless they be shewn. For which several authorities are cited. The Court therefore directed that the case should stand over for some days, in order to give the plaintiffs an opportunity of shewing that there were other matters in difference between these parties than the banking account, which were submitted to the arbitrators for their decision: without which they were of opinion that the award in question was good so far as respected the banking account, though void in respect of the sum awarded to be paid by the plaintiffs to the defendant out of the partnership fund of *Milnes, Lang, and Whitaker*, which was not submitted to the arbitrators by the terms of the reference. And no such affidavit having been produced, the rule was made absolute for reducing the sum for which the verdict was taken, pursuant to the award.

The KING against JONES and Others.

[451]

 Wednesday,
 June 3d.

THE defendants appealed to the Sessions against a rate made for the relief of the poor of the parish of *Holyhead* in the county of *Anglesey*; by which it appeared that "*Captain Jones*" was rated, "*for his packet, at 250*l.*—6*l.* 5*s.**" and three other

The owners of the packet boats employed under a personal contract with the post-

masters in carrying the mails, &c. between *Holyhead* and *Dublin*, are liable, in respect of the profits accruing to them from the carriage of passengers and luggage in such boats, to be rated for the same in the parish of *Holyhead*, where such owners reside, and from and to which the boats sail, where they are repaired, and where the passage money is in part receivable and is collected, though they are registered in another place.

defendants,

1807.

—
The KING
against
JONES
and Others.

defendants, captains of packets, were respectively rated, each for his packet, in the same sum. It further appeared on the trial of the appeal, that the appellants have all their houses at *Holyhead*, where their families at present reside; in respect of which houses they have been and are assessed to the poor's rate; but that heretofore some of them have resided in *Dublin*; and that government do not fix their place of residence. *Holyhead* is a place of little or no trade, having only a few small shops, the owners of which are not assessed to the poor's rate. Each packet boat, including the furniture, costs between 2 and 3000*l.*, and is provided by and at the expence of the appellants respectively, who are commanders thereof, and are at liberty to dispose of the same, provided they find others in their stead, to be approved by government, and so that the carriage of the mails, &c. be not obstructed; and the commanders may hire vessels to be used as packet boats from any other port, provided they are approved of by government. The packet boats of the respective appellants are registered in the port of *Beaumaris*. [And the case set out a certificate of registry of one of the packets, by which it appeared that one of the appellants had made oath that he was the sole owner; describing himself as of *Holyhead*; and that the vessel was built there and measured 104 tons and upwards, together with the usual description of her built, rigging, &c.] When hailed at sea, and asked where the packet boat belongs to, the answer is *Holyhead*; and the seamen navigating these boats reside at *Holyhead*. The appellants are respectively commissioned by his Majesty's Postmasters-General, who by an instrument under their hands and the common seal of the General Post-office appointed the appellants respectively to be commanders of their several packet boats; and the commissions run in these words "*W. Lord A. and C. S. &c.* his Majesty's Postmaster-General, to Captain *W. F.*, greeting: By virtue of the authority to us by the King in this behalf given, &c. we do hereby appoint you the said *W. F.* to be commander of the *Loftus* packet boat employed by this office in his Majesty's service to carry mails, &c. to and from *Holyhead* and *Dublin*. You are therefore to take the said packet boat into your care and charge, as commander thereof, and to keep as well the officers as the sailors belonging to the same in good order and discipline; and they are hereby required to obey you as their commander; and you to observe and obey

[452]

" such

1807.

—
The KING
against
JONES
and Others.

[458]

“ such orders and instructions as you shall from time to time receive from us or our agent for the time being. Given,” &c.
(a). The packet boats are employed in the service of government to carry the mails, &c. between *Holyhead* and *Dublin*, for which the commanders receive annual salaries. Each commander for better security is obliged to have his packet boat doubly rigged and doubly manned; and the annual expence attending the navigating, repairs, furniture, and other outgoings of the boats exceed the annual salary or allowance made by government for that purpose. But by permission of the Postmaster General the appellants carry on board their packet boats passengers with their luggage, horses, and carriages, and thereby make annual profits, which are of a fluctuating nature, as they depend upon the numbers of passengers, horses and carriages, which pass and repass: but the average is not less than 250*l* the sum at which they are rated. The passage money is paid where the passengers are landed or leave the packet boat; and as much of the passage money is received in *Dublin* as at *Holyhead*. The commanders are not allowed to be absent from their respective packet boats without leave of the postmaster General or his agents; and though they have such leave, the commanders are, by a regulation of government, ordered to be mulcted 40*s*. for every time a packet boat sails without its commander on board; 20*s*. of which is applied towards a fund for the relief of the commanders' widows; 10*s*. towards a fund for the widows of the mates; and 10*s*. to the mate who sails with the charge of the packet boat for his extra responsibility. One packet boat sails every day of the week with the mail, &c. (except *Tuesday*) from *Holyhead*, on which day no *London* mail arrives there; and on every day of the week (except *Sundays*) from *Dublin*, on which day no mail leaves *Dublin*: but they frequently sail on *Tuesdays* from *Holyhead* and on *Sundays* from *Dublin* with expresses and under the orders of government, and likewise with the mails when they have been detained by storms the preceding day. The commanders are bound to put to sea with the mail or express, however bad the weather may be, and have often been obliged to return to port. They are

(a) In answer to an inquiry made by the Court, it did not appear that the boats were engaged under any other written contract than what appeared in the case.

furnished

1807.

—
The KING
against
JONES
and Others.
*[454]

furnished by government with arms and ammunition ; *and government also sends to each commander its private signals of war, who communicates them to his mate alone under an injunction of secrecy. The crews are protected from being impressed by the Post-master General, under the direction of government, except in case of misconduct reported to government.

According to the regulations of government the commanders are prevented from having any apprentice, and are obliged to have at all times at least ten other able seamen on board. The commander has the whole charge of the repairs of the packet boat, without any allowance from government. They frequently sail without a passenger on board ; and are prohibited from carrying on any trade in the packet boats, as well by orders of government, as by the restriction of the act 13 & 14 Car. 2. c. 11. s. 22. But they make no custom-house entries, pay no custom-house fees, harbour dues, port charges, or for lights, as trading vessels do ; but 50*l.* a year is paid to the owner of the *Skurry* lights by the Post-master General, by virtue of the stat. 3 Geo. 3. c. 36. The appellants are responsible for their conduct as commanders of their packet boats to the Postmasters-General, who have a power of suspending them if their conduct be disapproved of ; which power has been exercised. The packet boats had formerly painted on their sterns the words *his Majesty's packet*, adding the name of it ; but the present boats have no such words. Before a new packet boat is laid down a plan must be sent up to government, to be laid before an inspector ; upon whose report it is built ; and while building he examines it, and afterwards certifies that it is fit for his Majesty's service. The case also stated one or two particular instances of a packet boat having been ordered off its station to another port for a special purpose.

[455] When there is an order from government to carry over any particular person, the agent to the post-master, under such order, prevents any other person from sailing in the packet boat, without the consent of the person for whose use it is so employed. Even in those cases however a preference is given to the mail, should such engaged packet-boat be the only one in port (*a*). The sessions on hearing the appeals confirmed the rate ; subject to the opinion of this Court, whether the appellants ought to be assessed. If it were considered that they ought not ; then the rate was ordered to be amended by striking out their names.

(*a*) There was much irrelevant matter stated in the case, which has been omitted.

1807.

The KING
against
JONES
and Others.

Holroyd was to have argued in support of the rate ; but after referring to the *King v. White* (a), where it was decided that ships were rateable in the port to which they belonged ; the Court, considering that case as concluding the question, called on the other side to controvert its authority, or to distinguish the present case from it.

Park and *Abbott*, contra, first said that the case of the *King v. White*, so far as respected the general question of the rateability of shipping, had been shaken in *Rex v. Liverpool* (b), and *Rex v. Collison* (c); though the point was not expressly decided,

[456]

(a) 4 *Term Rep.* 771.

(b) *Hil.* 38 *Geo.* 3. B. R. vid. next note.

(c) *E.* 43 *G.* 3. B. R. A note of this case was referred to in the last edition of *Burn's Justice*, tit. *Poor Rate*.

Rex v. The Inhabitants of the Parish of Liverpool. *Hil.* 38 *Geo.* 3. B. R. MS.—*Wm. Harper* appealed to the sessions against a rate wherein certain ships of his were rated. It was admitted by both parties, upon the hearing of the appeal, that the appellant dwells at *Everton*, a township adjoining the parish of *Liverpool*, and situated in the parish of *Walton upon the Hill*, in the county of *Lancaster*. That he holds now, and when rated held, a warehouse and counting-house in the town and parish of *Liverpool*, for both of which he is assessed by the rate, and has paid for the same : but that there is not any bed either in the warehouse or counting-house ; nor does, nor at the time of rating did, any person sleep in either of them. That the ships for which the appellant is rated are registered at the port of *Liverpool*, and are in the same register mentioned to belong to that port, and to be the property of *Wm. Harper* of *Everton*, &c. That the said township of *Everton* is an inland township, not accessible to ships. On hearing the appeal, it was contended by the appellant's counsel, that he was not at the time of making the rate an Inhabitant of the Parish of *Liverpool*, and therefore that the rate ought to be quashed as to the ships. And it was contended by the respondents that the appellant was under the circumstances, an inhabitant of the parish at the time. The sessions thereupon quashed the rate as to the ships, subject to the opinion of B. R., whether the appellant under the circumstances above stated were liable to be rated for the ships.

When this case was called on for argument the Court said that the question intended to be raised did not arise upon this statement of the facts ; because the sessions had found that the appellant was no inhabitant within the parish of *Liverpool*, but resided in a neighbouring parish ; and they had not found that the ships rated were locally within

1807.

—
The KING
against
JONES
and Others.

*[457]

decided [*Lawrence* J. observed that both those cases were defectively stated, and did not raise the general question. The statute 43 *Eliz.* c. 2. *imposes the rate upon *inhabitants* and *occupiers*;

within the *parish*, but only within the *port* of *Liverpool*, which might not be, and indeed they understood was not, co-extensive with the parish; and it was only on one or other of those grounds that the rate could be supported. The counsel said that sessions did not mean to find that the appellant was not an *inhabitant*, in a legal sense, of the parish of *Liverpool*, but to submit that question to the Court, under the circumstances. And as to the ships having been within the limits of the parish, there was no doubt of the fact. And therefore they desired that the case might either be amended by consent in that respect, or sent back to the sessions to be re-stated more accurately. But the Court said that they should dispose at once of this case, by directing the rate to be quashed, as to the ships; and the parties might bring on the question again upon a new rate if they thought proper. Lord *Kenyon* C. J. however, threw out an opinion inclining against the rateability under these circumstances. He said that a person might be deemed an inhabitant for some purposes and up to a certain extent, and yet not for all purposes; as in the case of repairing bridges, where according to Lord *Coke*, occupancy was inhabitancy. But he saw no reason, if this party were rateable in respect of his inhabitancy, why a *Dane* who came with his ship into the port and parish should not also be rateable; or why this same property should not be rated at every place on the coast whereat the vessel touched in her voyage. He observed that the stat. 43 *Eliz.* did not direct personal property to be rated *eo nomine*, but the persons themselves, *inhabitants*, according to their ability; which can only be known, in respect of personal property, which is of a fluctuating nature, by stating the account of debtor and creditor, and taking the surplus only as the criterion of that ability.

Rex v. Collison and Taylor, *E.* 43 *Geo.* 3, *B. R.* MS. Upon a case reserved at the sessions, as to the rateability of the defendants for their ships at *Hull*, it appeared they did not reside at *Hull*, though *Collison* had a counting-house there. But the defendants were stated to be the owners of the ships, and that the ships were locally within the parish at the time of the rate, and were registered at the custom-house there. On which it was contended that the parish of *Hull* was their *home*, and that it must be so considered for the purpose of the register acts. That if this species of property were rateable, as it was determined to be in the case of the *King v. White*, it mattered not whether

piers; and the Court only decided there that a person not *inhabiting* within a parish was not rateable there, merely because he had a * ship registered at the port and lying there at the time). In *Rex v. Collison, Le Blanc J.* considered that the proprietors of a mail coach could not be rated in any parish where it happened to put up in the course of the journey. (*Lawrence J.* That was still said with reference to the question of inhabitancy). They then argued generally, that this species of property was not rateable. Personal property is only rateable when

1807.

The KING
against
JONES
and Others.
*[458]

whether the owners were or were not personally resident in the parish for there must be persons on board the ships to take care of them; and the possession of beneficial property in a parish by means of a servant or agent was the same as a possession by the owner himself. And no inconvenience, it was observed, could ensue from his absence, because the parish had a remedy for the amount of the rate by means of a distress on the property itself. *The Court*, however, had great doubts upon the statement of the case, as well on the question of inhabitancy, which they seemed to consider as negatived by the statement; as also upon the defect of the case in shewing that the owners derived any benefit from the ships within the parish of *Hull*. They seemed to be clearly of opinion that the mere fact of the ships being registered at *Hull* could not make them rateable there: vessels were sometimes rated in places not their proper home. The registry was merely for the purpose of recording the transfer of property; and it was not considered of any weight in the case of the *King v. Liverpool*: and there too the party rated had a counting-house in the place. They observed also that the case did not state that the ships in question terminated their voyage at *Hull*, or that the owners received any profit there; without shewing which, they might on the same ground be rated at every place where they touched in the course of their voyage. And *Le Blanc J.* asked, whether the proprietors of stage coaches were liable to be rated in every parish where they stopped and changed horses in the course of their journey. The case was finally remitted to the sessions to be re-stated.

The same question came on again before the Court in another case from *Hull*, of the *King v. Howard, M. 44 Geo. 3. B. R.* But on its being called on for argument, Lord *Ellenborough C. J.* said that it was not stated that the ship was locally within the parish at the time of the rate, or that it produced any profit. That a ship might have met with losses at sea to a greater amount than her value; and was she nevertheless to be rated as soon as she came into port? The rate was thereupon quashed.

1807.
 —
 The KING
 against
 JONES
 and Others.

[459]

permanently local and visible, and producing profit, within the parish where the owner resides. If it have no proper locality, but is continually shifting from one place to another; if it be fluctuating and uncertain in its produce, like cases of casual adventure: still more if, while situated within the parish, it is wholly unproductive, and whatever profit may be made of it is earned elsewhere; it does not come within any of the principles on which property has been held to be rateable within a parish. Now here so long as the packets are stationary within the parish of *Holyhead*, nothing is earned to the appellants; the passage money, though paid at one or other of the two ports, is earned between the limits and out of the parish, and depends, besides, upon various contingencies. They then argued that the appellants acted under the command, and as the immediate agents of the king, in whose employ the packets must be taken to be; and that the permission to receive passage money was merely a mode of enhancing their salaries, which, without it, would not remunerate their labour, nor be adequate to the expences incident to their situation, and the providing and repairing the vessels: and that salaries (a), and personal labour (b) had been holden not to be rateable. That if the appellants received so much less, in consequence of being rated, than what was deemed a fair compensation to them, including the perquisite of passage money, their salaries must be increased, and the crown ultimately bear the burthen; though it is clear that property in the hands of the crown, or held for its benefit, cannot be rated (c).

Upon this part of the case however *the Court* very early in the argument expressed a clear opinion that, as the case was stated, they could not take these packets to be the property pro tempore of the crown. They were provided and kept in repair by the appellants, who must be taken to be the owners, and who engaged them in the service of the post office upon certain terms. In like manner as transports are contracted for by the navy board on freight to carry troops, or for other pur-

(a) *John Lander's case* in *Rex v. White and Others*, 4 *Term Rep.* 774. and *Captain Langhorne's case*, *ibid.* &c.

(b) *Rex v. Hogg*, 1 *Term Rep.* 731. and *Rex v. Startifant*, 7 *Term Rep.* 60.

(c) *Lord Amherst v. Lord Somers*, 2 *Term Rep.* 372.

1807.

The KING
against
JONES
and Others.
* [460]

poses; but it never was considered that the property in them was transferred to the crown, though the masters were subjected *to a certain degree of discipline and control while engaged in the service. And some of the judges even intimated a doubt whether the *salary* of the commanders, as it was called in the case, were any other than part of the hire and earning of the packet boats: but there was no decision on this part of the case. And

Holroyd observed, that not long since one of the *Harwich* packets, which are employed in the same manner as these, was taken in execution for the debt of the owner: and though the question was under consideration, no doubt was entertained but that the vessel was properly seized by the sheriff.

LORD ELLENBOROUGH C. J. I cannot distinguish this from the case of the *King v. White*; and unless the Court felt themselves pressed to surrender the authority of that case, these packet-boats must be held to be rateable. It is objected that they are not permanently local property in the parish of *Holyhead*, and that no profit is made of them there. But the inchoate act which is to earn the profit begins there; and therefore there is a part-performance within the parish of that which is to make the profit by the use of the property in question. The boats are laid up there, they are repaired there; the owner dwells there; they yield profit there; for the passage money of the voyage from *Dublin* is actually earned there; and that of the voyage from *Holyhead* to *Dublin* is at least begun to be earned in the parish of *Holyhead*. But whatever the question might be as between *Dublin* and *Holyhead*, in this respect, it could only go to the quantum, with which we have no concern in this case: it is enough that this is, what it is contended it ought to be local visible property in the parish; that it yields some profit there cannot be doubted; and the owner resides in the same parish. This brings it completely within the *Poole* case: and if the extent of the voyage, and the length of time during which the vessel is absent from its own port could at all vary the consideration, these circumstances are more in favour of the rate in the present case. But independently of the authority of that decision, I think it rests upon sound reason; for the possession of such a vessel within the parish by an *inhabitant* actually residing there, and making profit of it, constituted so much of his *local ability* to contribute to the maintenance of

[461]

1807.

—
The KING
against
JONES
and Others.

the poor of the parish under the description in the statute of *Elizabeth*.

GROSE J. The question is whether these appellants, who are inhabitants at *Holyhead*, are rateable on account of property in that parish. First, it is said that the packet-boats, in respect of which they are rated, are not property within that parish; but the facts of the case are an answer to that objection. *Holyhead* is the home of the packets: from thence they take their departure, and thither they return; there they are repaired; and there their owners reside; and the property so circumstanced is stated to produce great profit to the owners. They are therefore liable as inhabitants within the parish to be rated for it, within the fair meaning of the statute of *Elizabeth*; and the case of the *King v. White* is directly in point as to the rateability of inhabitants for this species of property. But then it is said, that this is the property of the king, and therefore not rateable; and that the perquisite of passage money is in lieu of an additional salary. But there is no pretence for saying that these packets are the property of the crown; the owners make a personal contract with the post-office, on certain terms, to carry the mails, &c. and in consequence of the regulations under which they oblige themselves to navigate their vessels, it is notorious in every port where they are established, that they have much greater custom in carrying passengers, &c. than any other vessels; and here the advantage is stated to be 250*l.* a year; much above what they receive directly from government under the name of salary. There is therefore no reason why the owners, who reside in the parish, should not be rated for this species of property within the parish, from which they derive so much profit.

[462]

LAWRENCE J. The case of the *King v. White* rules the present case; and unless we are prepared to overturn that, we cannot do otherwise than confirm the rate before us. The cases which have been mentioned, of the *King v. Liverpool*, and the *King v. Collison*, were not intended to shake that of the *King v. White*; for in the two former the attempt made was, not to rate ships being in the parish where the owners resided, but in a different parish, merely because the ships were registered there. And all that the Court there meant to say was that a ship being registered in a parish did not make the owner an inhabitant of that parish, within the meaning of the statute
of

1807.

—
The KING
against
JONES
and Others.

[463]

of *Elizabeth*. But it is insisted that the packet boats belong to Government, and not to the appellants who have been rated for them: the true nature of the contract, however, as it appears, is that the Post-masters contract with these persons for the hire of their vessels to carry over the mails to *Dublin*; but that does not make them cease to be their property; and they continue to make all the advantage of it for their own benefit which the nature of their employment admits of. And though the government may exercise authority over them in certain particulars, yet that is no longer, nor otherwise, than as the owners chuse to retain their employment. They are paid in the double character of owners and masters. And they are subjected to the control of the post office for the exigency of the service, in like manner as are the masters of transports, which are always subject to the control of the transport board: but that was never conceived to divest the property of the owners in those vessels and transfer it to the crown. The bye-boats between *Calias* and *Dover* are engaged in the same manner. If the master of a ship, not under charty-party, engage to carry out troops for government to the *West Indies*, the property still continues in the owners: and it cannot make any difference whether a vessel be hired to carry out passengers, or goods; or whether the service be performed under a hiring by the crown, or by a private individual: the property still remains in the owners; the seamen and others employed on board are their seamen and servants, and not the seamen or servants of the crown. In respect to these packets, if certain things which the owners engage for be not done, government may cease to employ them any longer: but they cannot divest them of their control over the vessels and appoint others to command them. Then it is argued that this is not local visible property, producing profit, within the parish: the case however states that the boats are built and repaired at *Holyhead*; that the masters live there, and there hire the crew. There is no other place besides *Holyhead* and *Dublin*, to which it can be pretended that these boats belong: but though there were the same poor laws in *Dublin* as here, I do not see how the boats, under these circumstances, could be rated there: though even that would only affect the quantum of the rate. It is said however, that to make property rateable in any parish, it must be *permanent* in

[464]

1807.

The KING
against
JONES
and Others.

that parish, and produce profit there ; and that this property is only made productive by going out of the parish. The same argument, however, applied with equal force in the case of *The King v. White*, where it was over-ruled. But why may not this property be said to be productive in the parish ? The contract for the passage money from *Holyhead* to *Dublin* is made at *Holyhead* ; and there is an inchoate inception of the voyage there : and that from *Dublin* is actually paid at *Holyhead*, where the contract is completed. At any rate, however, this objection, if it could have place at all under these circumstances, would only go to the quantum ; though at present I think the boats would not be rateable at all in *Dublin*.

LE BLANC J. I am of opinion that these boats are local visible property in the parish where they are rated. The rate is made on the persons inhabiting within the parish in respect of the packet boats there belonging to them : and the only question is, whether this be that sort of property for which the parties are liable to be rated ? The case of *The King v. White* determined that the owner was liable to be rated for a ship in the parish to which it belonged, and where he himself lived. In this case I must consider that the packet boats are the property of the appellants, because they build and repair them : it is part of their respective capitals invested in shipping. The registry acts have no bearing upon this case. The only argument which has ever been drawn from them is, that they require that a ship should be registered at the port, at or near which the owner lives (a) ; and therefore that the registry in any port was to be taken as an indication of the owner's residence there. But here it expressly appears that these boats are the property of the appellants, who reside in the same parish from whence the boats sail and to which they return. The contract which the appellants have entered into with government for carrying the mail cannot differ this from the case of any ordinary contract for the carriage of the goods or persons of any individuals. Government indeed may deem it proper to stipu-

[465]

(a) The provision of the 5th sect. of the stat. 26 Geo. 3. c. 60. is, that the port to which a ship shall be deemed to belong (and where by sect. 4. she is to be registered) *within the intent and meaning of that act*, shall be the port from and to which such ship shall usually trade, &c., and *at or near* which the husband, or acting and managing owner or owners, usually reside.

late for a certain number of seamen, &c. for securing a safe and convenient navigation of the boats; and the burthen of providing this superior accommodation may make the property less productive than a smaller establishment would do: but that does not vary the question of ownership: it only goes to the quantum of profit, with which we have no concern. This cannot therefore be considered as a rate on government, but upon the capital of these appellants, employed in this manner in the parish, and yielding them profit.

Rate confirmed (a).

(a) Vid. *Rex v. The Company of Proprietors of the Staffordshire and Worcestershire Canal Navigation*, 8 Term Rep. 340. and *Rex v. Leeds and Liverpool Canal Company*, 5 East, 325. and the cases there cited, as to the place of rating where the profits become due or are paid.

SYNGE, Executor, &c. *against* JERVOISE.

AT the trial of this cause, a juror was withdrawn, and it was agreed to be referred under an order of nisi prius, which was afterwards made a rule of Court; and an award was afterwards made on the 27th of March last. And now *Wigley* moved to set aside the award upon the ground of misconduct in the arbitrator. But an objection was started in limine by the Court to their entertaining the motion on account of its being out of time; one whole term having elapsed since the award made. And though it was observed that this was not a reference under a rule of Court by virtue of the statute 9 and 10 W. 3. c. 15. which requires the application for setting aside an award under that statute to be made before the last day of the next term after such award made: yet *the Court* thought at first that the practice had been to regulate their own discretion, with respect to motions for setting aside awards made under orders of nisi prius, with reference to the limitation of time prescribed by the statute. But on *Wigley's* referring to *Anderson v. Coxeter* (a), where the limitation of the statute was holden not

1807.

The KING
against
JONES.
and Others.

[466]
Wednesday,
June 23d.

The time limited by the stat. 9 & 10 W. 3. c. 15. s. 2. for setting aside awards, made under submissions by virtue of that statute, does not attach on awards made under orders of nisi prius.

(a) 1 Stra. 301.

1807.

—
SYNGE
against
JERVOISE.

to extend to an award made under a rule of *nisi prius*, by which he said, the practice had hitherto been regulated in similar cases.

The Court acquiesced, and permitted him to state his affidavits in support of the motion: but being ultimately of opinion that no sufficient ground was laid for disturbing the award, no rule was made.

[467]

Saturday,
June 6th.

SCOTT against SCHOLEY and Another.

A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of fieri facias at the suit of a judgment creditor.

THIS was an action on the case against the defendants, as sheriff of *Middlesex*, for a false return of nulla bona to a writ of fieri facias issued upon a judgment of *Michaelmas* term 1792, for 1600*l.*, at the suit of the plaintiff, against the goods and chattels of *George Coleman*; indorsed to levy 1300*l.* besides poundage, &c.; to which the defendants pleaded the general issue: and a verdict for 1300*l.* having been given for the plaintiff at the trial at the sittings at *Westminster* after *Hilary* term 1806, which was moved to be set aside in the following term, the following facts were agreed to be put in the form of a case for the opinion of the Court.

On the 10th of *July* 1795 an indenture of lease was granted by *G. Moore* to the said *George Coleman* of the *New Theatre* and some adjoining premises in the *Haymarket*, in the county of *Middlesex*; to hold to *Coleman* from *Lady-day* then last for 17 years, at the yearly rent of 400*l.* On the 13th of *August* 1795 another lease was granted by *J. Mucklow* to *Coleman* of a piece of ground and premises in *James-street* in the *Haymarket*, to hold from *Midsummer* then last for 16 years, at the yearly rent of 31*l.* 10*s.* On the 8th of *September* 1795, by a deed of assignment made between *Coleman* of the 1st part, *G. Wathen* and *S. Arnold* of the 2d part, and *W. Morland*, *F. Const*, and *T. Holloway* of the 3d part, *Coleman* (with the consent of *Wathen*, *Arnold*, and *Const*) assigned to *Morland*, *Const*, and *Holloway* the said theatre and other premises comprised in the said two leases for all the time then to come therein: and *Coleman* by such deed also assigned to them the wardrobe, dresses, ornaments, music, musical instruments, compositions, and pieces, and all copy-right, property, and interest of his deceased father in all plays, &c. dramatical

[468]

1807.

—
SCOTT
against
SCHOLEY
and Another.

matrical, musical, or other pieces, the property of the said theatre, upon trust to grant certain annuities; which were accordingly granted, but which determined on the 15th of *October* 1804; and to make certain payments which were accordingly made; and with an ultimate trust for *Coleman*, his executors and assigns. By two several indentures indorsed on the last-mentioned deed of assignment *Coleman* charged his interest in the said trust premises with certain sums of money; all which were paid off and discharged before the 13th of *October* 1804, except two several sums of 800*l.* and 273*l.* with an arrear of interest thereon, due to *T. Holloway*. By another indenture of assignment, dated the 13th of *October* 1804, also indorsed on the same deed, and made between *Coleman* of the 1st part, *W. Jewell* of the 2d part, and *Morland, Const and Holloway* of the 3d part; after reciting that the trusts of the former assignment of the 8th *September* 1795 had been executed without any sale of the trust premises, and that the sums secured by the before-mentioned deeds, except those due to *Holloway*, had been paid out of the rents, profits, and produce of the trust premises; *Coleman* assigned to *Morland, Cont, and Holloway*, the said theatre, leasehold premises, and other effects assigned by the former assignment discharged from the trusts of that assignment and the indentures indorsed thereon; but upon trust to pay the bills of certain tradesmen employed by the trustees on account of the theatre, amounting to 1400*l.*: and after payment thereof, upon trust for paying to *Holloway* 2202*l.* 8*d.* and to *Jewell* 4044*l.* 5*s.* and afterwards in trust for *Coleman*, his executors, &c. Previous to the 4th of *June* 1805 *Coleman* contracted with *D. E. Morris* for the sale to him of one undivided fourth part of his term in the said theatre and leaseholds, and of the machinery, wardrobe, dresses, musical and other instruments, books, copy-right, and other theatrical stock, and property at such theatre, for 3500*l.* and also contracted with *P. Tahourdin* and *J. Winston* for the sale to them of another undivided fourth part of the same property, at the like price of 3500*l.* On the 4th *June* 1805, by indenture of nine parts, between *Morland, Const, and Holloway*, of the 1st part, *Jewell* of the 2d part, *Coleman* of the 3d part, *Catherine* his wife of the 4th part, *Morris* of the 5th part, *P. Tahourdin* and *Winston* of the 6th part, *J. Neeld*, of the 7th part, *F. Fladgate* of the 8th part, and *G. Tahourdin* and *J. Stuart* of the 9th part; after reciting the leases and other deeds, circumstances, and contracts above set forth, to
the

1807.

—
SCOTT
against
SCHOLEY
and Another.

[470]

the effect above stated ; and that at the time of entering into the contract with *Morris* it had been stipulated by him as the brother of *Cath. Coleman*, and agreed to by *Coleman*, that some provision should be made for the said *Catherine* his wife (she then living separate from her husband) out of the profits and produce of the remaining two-fourth parts of the said property to be retained by her husband ; but that such remaining moiety should stand as an indemnity to the said *Morris P. Tahourdin*, and *Winston* against all claims upon them, or the shares purchased by them, by the said *Catherine*, or the tradesmen or other creditors or claimants of *Coleman* : and reciting that all the trusts of the several recited deeds had been fully performed, except the payment of 2272*l.* 17*s.* 9*d.* to *Holloway*, and 4173*l.* 1*s.* 8*d.* to *Jewell*, and the payment of the tradesmen's bills in respect of the theatre and trust premises ; upon payment whereof no incumbrance would remain upon the said property, except the rents payable under the leases, and the charges to be made under that present indenture : and reciting, that to provide a fund for payment of the tradesmen's bills, *Coleman* had applied to *Neeld* to advance him 1233*l.* 14*s.* 5*d.*, at interest, for six months ; and had agreed that such sum and interest should be secured as after mentioned ; and that *Neeld* had advanced the money, which was to be paid to *Morland, Const, and Holloway*, to be applied as after mentioned : and reciting that it had been agreed that 1272*l.* 17*s.* 9*d.*, part of the money so due to *Holloway*, and the whole of the money so due to *Jewell*, should be paid out of the purchase monies, and that for the security of the purchasers judgments, which had been confessed for securing to *Holloway* and to *Jewell* their said debts, should be assigned to *G. Tahourdin*, upon trust, to keep such judgments on foot as a paramount security and protection to the purchasers respectively ; *P. Tahourdin* and *Winston* having agreed to secure the payment to *Holloway* of 1000*l.*, the remainder of the said debt : it was witnessed, that in consideration of 3500*l.* by *Morris* and of 3500*l.* by *P. Tahourdin* and *Winston*, and of 1233*l.* 14*s.* 5*d.* by *Neeld*, at *Coleman's* direction, paid to *Morland, Const, and Holloway* ; amounting together to 8233*l.* 14*s.* 5*d.*, out of which was to be paid (and was paid) at the execution of the deed to *Holloway* 1272*l.* 17*s.* 9*d.* in part of his debt ; the remaining 1000*l.* being agreed to be secured (and in fact since paid) by *P. Tahourdin* and *Winston* ; and to *Jewell* 4173*l.* 1*s.* 8*d.* ; and 1787*l.* 15*s.*, residue of the

8233*l.*

8,238*l.* 14*s.* 5*d.*, or a competent part thereof, was to be applied in payment of * tradesmen's bills; and the surplus (if any) to *Neeld*, in part discharge of the sum advanced by him: *Morland*, *Const*, and *Holloway*, assigned, and *Holloway* and *Jewell* respectively released, and *Coleman* assigned and confirmed, to *Neeld* and *Fladgate*, the said theatre, leases, wardrobe, &c. and other trust premises, and all *Coleman*'s dramatic works and compositions, and all other the estate, goods, chattels, effects and property, whereof *Coleman*, or any other in trust for him, was possessed or entitled to in the said theatre or otherwise, so in respect thereof discharged from the trusts of the before mentioned indentures; but upon the following trusts, viz. 1st, as to the 1,787*l.* 15*s.* to pay the bills then due for workmanship, &c. at the said theatre, but not any of *Coleman*'s private debts; and the residue, if any, to *Neeld*, in part discharge of the money advanced by him. And as to the premises assigned to *Neeld* and *Fladgate* upon trust to pay the rents reserved by the said leases, taxes, and insurance from fire; and to indemnify *Morland*, *Const* and *Holloway* against all actions, &c. in respect to their having acted as trustees under the deed of the 8th September 1795, or having executed that indenture: and subject thereto as to one undivided 4th part, in trust for *Morris*; and as to another undivided 4th part, in trust for *P. Tahourdin* and *Winston*, as tenants in common: and as to the remaining two undivided fourth parts, the assignment made by the said deed was thereby declared to be, upon trust out of the rents, profits, and annual proceeds, to pay the remainder of the debt, if any, then due to *Neeld*; to indemnify *Morris*, *Tahourdin*, and *Winston*, against the payment of the ground rent, tradesmen's bills, and other claims, beyond their due proportion of the reserved rents; to raise an annuity of 300*l.* for *Catherine Coleman* during the joint lives of her and *Coleman*; and afterwards, in trust for *Coleman*, his executors, &c. And subject to the said several trusts to permit and suffer *Coleman*, *Morris*, *P. Tahourdin*, and *Winston*, or the three last-named persons only (in case it should appear to *Neeld* and *Fladgate* adviseable on account of *Coleman*'s debts to exclude him for a time) to have the full use and enjoyment of the said theatre and trust premises, for the purpose of rendering the same as productive as possible. The judgments to *Holloway* and *Jewell* were by the same deed assigned for the purposes mentioned in the recital: and *G. Tahourdin* and *Stuart* were empowered by *Holloway* and *Jewell*

1807.

—
SCOTT
against
SCHOLEY
and Another.
*[471]

[472]

1807.

 SCOTT
 against
 SCHOLEY
 and Another.

Jewell to issue executions on them, so as to keep out any other execution against the property by any other of *Coleman's* creditors and also to acknowledge satisfaction on record. The whole of the consideration money stated in this deed was paid and applied in the manner therein described; and *Coleman's* interest in the unsold moiety of the leasehold theatre, machinery, wardrobe, and instruments, was worth more than the incumbrances charged on it and the amount of the plaintiff's execution. The plaintiff's judgment and writ of fieri facias were regularly proved: and on the 19th of *June* 1805 the defendants, then sheriffs of *Middlesex*, entered the theatre under such writ, and continued in possession until the middle of *September* at the request of *Neeld* and *Fladgate*, who on the 20th of *June* 1805 delivered to the sheriff a copy of the deed of the 4th of that month before stated. On the 10th of *September* 1805 the defendants served the plaintiff with notice of taking an inquisition by a jury concerning the property in the said theatre; but *Neeld* and *Fladgate*, together with *P. Tahourdin*, having indemnified the defendants for returning nulla bona to the plaintiff's writ, the defendants withdrew from the said theatre; without taking any inquisition; and in *Michaelmas* term made a return of nulla bona on the plaintiff's fieri facias. The question for the opinion of the Court was, whether or not under the above circumstances the plaintiff were entitled to recover: if he were, the verdict was to stand; if not, then a new trial was to be granted. The case was argued in *Easter* term last by

[473]

Marryat for the plaintiff. The question is, Whether the equitable beneficial interest, concurrent or residuary, which *Coleman* had in the term of years in the theatre and other property comprised in the trust deed of the 4th of *June* 1805, were subject to be taken and sold by the sheriff under the writ of fieri facias issued against *Coleman* at the suit of a judgment creditor? Strictly speaking *Coleman* had not a mere equity of redemption on payment of present incumbrances, but rather a partial present interest in the term. He, in conjunction with three others, is by the terms of the trust to have the full use and enjoyment of the property, unless the trustees shall see reason to exclude him for a time, on account of his debts: and the funds out of which the incumbrances and charges are to be paid are "the rents, profits, and annual proceeds." The subject-matter, therefore, of the execution is a chattel interest held in trust for the immediate benefit

benefit of the debtor, and not a mere ulterior modification of such an interest. And the question, in this view of the case, will be, Whether the trust can protect such an interest from common law process against the debtor? There is no case however, at law which has decided that even an equity of redemption may not be taken in execution. It may be admitted that it cannot be taken under an *elegit*; and that the 10th section of the statute of frauds, by which the trust of an inheritance is made assets at law, does not extend to the case of a trust of a term of years; (the Legislature, as he contended, having then considered that the trust of a term was seizable before, and therefore wanted not their aid to make it so;) yet there is a great difference between an *elegit* and a *fieri facias*; the former is process given by statute (*a*), which must therefore be executed with all statutable qualifications: but the latter is a common law process executable upon all goods and chattel interests, without restraint; and it lies on the other side to shew that a partial interest in a chattel is not seizable from the nature of the writ; the very form of which shews that it is not necessary for the goods or chattels sold under it to be within the corporal touch of the sheriff at the time; for it commands him *to cause to be made* of the goods and chattels of the defendant the sum recovered. [Lord *Ellenborough* observed that the terms of the subsequent process of *venditioni exponas* seemed to imply that the sheriff should have made an actual seizure before sale. And *Lawrence J.* adverted to *Jeanes v. Wilkins* (*b*), where Lord *Hardwicke* held that a sale of a leasehold by the sheriff, under a *fieri facias* was good, without any *venditioni exponas* issued.] In every case where a legal term is taken in execution, it is the *interest* of the debtor in the term which is taken and sold, and not the land itself or the indenture of demise. The deed is only *evidence* of the right, and not the right itself. [*Lawrence J.* asked if he meant to contend that the sheriff could by virtue of the writ sell cattle or other goods of the defendant in the execution, merely by making out a bill of sale of them in his office to the purchaser, without having first made an actual seizure of the property; and leave the other afterwards to bring his action of *trover*?] There is a distinction in this respect between things which pass by *delivery* and by *assignment*. There

1807.

SCOTT
against
SCHOLEY
and Another.

. [474]

[475]

(a) Stat. Westm. 2. 13. Ed. 1. c. 18.

(b) 1 Ves. 195.

1807.

—
SCOTT
against
SCHOLEY.
and Another.

can be no delivery of a term : it can only pass by assignment. Suppose the indenture to be lost, or purposely withheld by the debtor, the sheriff cannot make even a symbolical seizure of the term. The law, however, has contemplated this difficulty ; and therefore it is sufficient for the sheriff to assign to the vendee *all the interest* of the party in general terms : for, says the Court in *Palmer's case* (a), the sheriff, “ by common intendment cannot “ have precise knowledge of the beginning and end of the “ term,” “ not having means to be informed thereof.” And this was recognized in *Taylor v. Cole* (b), where it was held sufficient for the sheriff, in pleading the taking of a term under a *fi. fa.*, to state that the party was possessed of a *certain interest* in the residue of a *a certain term of years*; without stating what that interest was, although it was objected that it might be any other interest than the term itself. [It was observed by the Court that Lord *Kenyon's* words there were, “ that the plaintiff was *in possession* of a certain term ; and that it was impossible to suggest any *possession* of a term that was not the subject of seizure be the sheriff under a *fieri facias*.” From whence it might be presumed that he meant to speak of a *legal* possession by the termor.] The same difficulty would apply in full force in the case of an execution against the tenant of a legal term in an incorporeal hereditament, or in a lease by parol for three years ; which no doubt might be assigned by the sheriff, and yet are not capable of actual seizure. But whatever the inconvenience may be, where the sheriff has no certain means of ascertaining to the vendee what the debtor's interest in the term is, for want of the deed ; the debtor himself who withholds the necessary information will be the only sufferer ; as his interest will sell for so much less on account of such uncertainty. The difficulty, however, of a seizure and sale by the sheriff of an equitable interest in a term is not greater than in many cases of legal interests which are clearly vendible by him. The interest of one tenant in a joint chattel may be taken in execution on a *fi. fa.* (c) and yet the co-tenant cannot be dispossessed of it, nor can his share be sold without his consent. So here the sheriff might have sold *Coleman's* partial interest in the theatre without affect-

[476]

(a) 4 Co. 74. and Cro. Eliz. 584.

(b) 3 Term Rep. 292.

(c) *Bachurst v. Clinkard*, 1 Show. 169. (173). and *Eddie v. Davidson*, Dougl. 650.

1807.

SCOTT
against
SCHOLEY
and Another.

ing the possession of the trustees or the interests of the other parties to the deed. Goods pawned may be taken in execution against the pawner, upon satisfaction of the pledge (*a*). And though it be said (*b*) that in the case of a lease of land and of a stock of cattle for a year, they cannot be taken in execution during the term; that is, because the lessor himself could not have dispossessed his tenant during the year; and of course the lessor's creditor cannot. But subject to the right of the pawnee in the one case, and of the lessee in the other, the goods may be taken: and if a rent were reserved to the lessor, the debtor, out of the chattel, such rent might presently be taken in execution. In *Cadogan v. Kennet* (*c*) the household furniture vested in trustees, in trust for the husband for life, remainder to the wife for life, &c. were held amenable, as to any rent which was made of them, to the husband's creditors, during his life. [The Court said that was only an equitable arrangement at nisi prius.] The same difficulty did not occur here as existed in that case: for the sheriff here was not required to dispossess any other person entitled to the possession; but only to sell subject to the rights of all those who had concurrent or prior claims. It seems difficult to distinguish in this respect the case of an interest of this description from that of any legal reversionary interest in a chattel, which may doubtless be sold under a *fi. fa.*: as if a lessee for a long term of years underlet; that will not protect the original lease from being taken in execution during the sub-term, subject to the undertenant's interest: and yet there is nothing for the sheriff to deliver possession of. And it can make no difference in that respect whether the sheriff get possession of the deed or not, any more than in the case of an execution against the sub-tenant in possession. [Lawrence J. referred to *Plunket v. Penson* (*d*), where Lord Hardwicke says, that "if there be a mortgage for 1000 years, and the reversion in fee left in the mortgagor, it will be legal assets; because the bond creditor might have judgment against the heir of the obligor, and a *casset executio*, till the reversion come into possession. But where it is a mortgage of the whole inheritance, he did not see what remedy a bond creditor could have to make it assets at law. [That would be leaving the debtor to enjoy the property in the mean

[477]

(*a*) *Bro. Abr. Pledges*, pl. 24. (*b*) *Ibid.* and tit. *Execution*, pl. 107.
(*c*) *Comp.* 432. (*d*) 2 *Ath.* 294.

1807.

—
 SCOTT
against
 SCHOLEY
 and Another.

* [478]

time. But it seems more reasonable to say, * that whatever interest the debtor himself may sell, the sheriff may also sell; although it may not be capable of actual seizure and delivery. As in *York v. Twine (a)*, an annuity granted by the crown under the great seal, and payable by the receiver in the Court of Wards, was sold by the sheriff under a writ of *fi. fa.*; and held well. Great inconvenience and prejudice to creditors will ensue if equitable interests are held to be exempt from common law executions. A large mass of property is enjoyed under executory contracts. Lands are often held, especially for the purpose of building, under an agreement for a lease, which is seldom granted till all the houses are built, and frequently the tenants rest satisfied with such equitable demises. All this property will be out of the reach of the Courts of Law. Besides which, any person possessing a chattel interest of however great value may prevent its being taken in execution for his debts by mortgaging it for a small sum, and thereby converting his present legal into an equitable reversionary right, although he would continue in the complete enjoyment of it as before. And arguments ab inconvenienti are always allowed to have weight in the absence of express authorities against them.

[479]

Richardson contra. There is no authority to shew that any other than a legal interest can be taken in execution under the legal common law process of *fieri facias*: and therefore the general rule applies, that where there is no legal right, there is no legal remedy. All the cases cited of joint chattels, annuities, and terms for years, taken and sold by the sheriff, are plainly cases of legal interest: and the latitude allowed to the sheriff in the general terms of his assignment is no more than what holds in all cases of pleading title in a stranger, of which the party is not presumed to have such certain knowledge as of his own. The turn of expression used by Lord *Kenyon* in *Taylor v. Cole (b)*, speaking of *the possession* of the term, shews that it was with reference to a legal interest. The principal question, however, in that case turned upon the *expulsion*, whether that were laid as matter of aggravation only to the breaking and entering, and covered by a justification of the latter; or as a substantive trespass: and the Court held it to be only aggravation. The cases of the pawnee and lessee mentioned in *Bro. Abr. Pledges, pl.*

(a) *Cro. Jac.* 78.(b) 3 *Term Rep.* 295.

1807.

SCOTT
against
SCHOLEY
and Another.

24. and *Execution pl.* 107, as far as they go, make rather against the plaintiff's argument; for they shew that the sheriff could not take the pledge in the one case, nor the cattle in the other, until the intervening interest of the pawnee and lessee were satisfied or expired. It may however be admitted that a legal reversionary interest in a chattel, after a sub-term of years, is a saleable interest by the sheriff: but it does not follow that an equitable interest is also saleable. And in *Cadogan v. Kennett (a)*, all the points in judgment were decided in favour of the trustees against the execution creditor of the cestuy que trust; and the goods taken and not sold were directed to be restored to the trustees; though as to those which were sold an equitable arrangement was entered into; which could only have been done by consent: yet it was clear that the debtor had an equitable interest in the property for his life. On the other hand there are many authorities to shew that a judgment creditor must go into a court of equity in order to get possession of the equitable interests of his debtor. There is a distinction indeed in those Courts between what are there called *legal* and *equitable* assets; and sometimes the former denomination is applied to interests vested in trustees: but that is to be understood where the trusts are so plain that there needs no direction of the Court how they are to be executed. There, though they can only be got at in a Court of equity, yet, when obtained, they are marshalled and applied *as legal assets in a course of administration*. Equitable assets on the contrary are such as are distributable equally pro rata amongst all the creditors, whether by simple contract or specialty, according to the equitable discretion of the Court. The denomination therefore of *legal* assets in the books of equity, means no more than such assets, as, though arising out of equitable interests, are always legally distributed by a Court of equity in a course of administration. Sir *Charles Cox's* case (*b*), and *Wilson v. Fielding (c)* establish this distinction and shew the grounds of it. Now these are only equitable assets; such as a Court of equity, in case of *Coleman's* death, would distribute *pari passu* amongst all his creditors, and not in a course of administration. They are always so considered wherever the charges are uncertain, and an account must be taken, or protection is to be extended to other interests than

[480]

(a) *Cowp.* 432.
VOL. VIII.(b) 3 *P. Wms.* 341.
C c(c) 2 *Vern.* 763.
those

1807.

SCOTT
against
SCHOLEY
and Another.

*[481]

those of the creditor. And in *Hartwell v. Chitters (a)*, Lord *Hardwicke* expressly held that the equity of redemption of a leasehold was equitable assets. And *Lyster v. Dolland (b)* is the judgment of a court of equity, that it cannot be taken in execution at common law. In a case of doubt, it is an argument against the authority of the sheriff to seize and sell such an interest as this, that the creditor will not be in a better situation after the sale than before; for the sheriff could only sell subject to the trusts; and therefore the act would be nugatory, after all the expence of it incurred. The execution creditor, or the vendee, would still be obliged to go into equity to get an account, or to redeem prior incumbrances: which may be done in the first instance by a judgment creditor with less expence and delay. Besides the destruction of the debtor's estate; which under so much doubt and difficulty would sell greatly under value: so that a large equitable interest might be exhausted in satisfaction of a small demand to the detriment of other creditors. Again, if one equitable interest may be taken and sold, another, behind the first, may be taken also. And if the rights of all these parties could not be decided at law, still less can they be decided by the sheriff: and in cases of intricate and complicated equities, the Courts of Law could not know whether the sheriff had made a false or true return. And questions, of which the Courts of Law could not take original cognizance, would thus be brought consequentially within their jurisdiction. In *Burdon v. Kennedy (c)*, Lord *Hardwicke's* opinion is express that a fieri facias would not affect an equity of redemption of a leasehold, but that the judgment creditor must come into equity. Now this, though not a mortgage, must be governed by the same rule: it is a charge to pay off debts, and *Coleman* has only a resulting equity after payment of the debts. And in [482] *Preston v. Christmas (d)*, an equity of redemption was said to be nothing in the eye of the law.

Marryat in reply said, that the cases in equity concerning the marshalling of assets had no bearing on this question. And that the expressions made use of in some of them, as to the necessity of creditors going into equity, were with reference to cases of testacy and of intestacy. In *Sharpe v. The Earl of*

(a) *Ambl.* 308.(b) 1 *Vez. jun.* 431, and 3 *Bro. Ch. Cas.* 478.(c) 3 *Atk.* 739.(d) 2 *Wils.* 86.

Scarborough (a), it was said that Sir Cha. Cox's case applied only to bond, and not to judgment, creditors; and that as to the latter, it was not to be considered as equitable assets: and both that case and *Hartwell v. Chitters* were considered to have been over-ruled. He also referred to *Morrice v. The Bank of England* (b). As to the difficulty of the sheriff's seizing an equitable interest, the same difficulty exists now where there are two executions out against the same property; for after the first seizure, there remains nothing but a trust to seize under the second execution. And if the value of the property seized be sufficient to satisfy all the prior claims, the difficulty of apportionment will not arise. But all that the execution creditor or the vendee could claim in this case was to stand in the same situation as *Coleman* himself, with respect to this property; which would not interfere with the rights of any third persons. If indeed he wished to redeem the prior incumbrances, he must file his bill in equity. The mere uncertainty of the extent of the prior or concurrent charges will not make these equitable assets: as in *Allan v. Heber* (c), a devise of land to the heir, subject to payment of debts, was esteemed assets at law. And here he contended, that *Coleman* had a partial present interest in the term, and not a mere equity of redemption.

Lord ELLENBOROUGH C. J. said that the case involved a question of great magnitude and extent, upon which it was proper for the Court to deliberate before they pronounced their judgment. The case therefore stood over till this day, when his lordship delivered the opinion of the Court.

This was an action on the case against the defendants, as sheriff of *Middlesex*, for a false return of nulla bona to a writ of fieri facias against the goods and chattels of *George Coleman*, Esq., which was tried before me, and in which a verdict was given for the plaintiff. Upon a motion for a new trial, it was ordered that the facts should be stated in the form of a case for the opinion of the Court. [After stating the material facts of the case his lordship proceeded.]

The question of law arising out of these facts is, whether the residuary beneficial interest of Mr. *Coleman*, under the trusts

1807.

SCOTT
against
SCHOLEY
and Another.

[483]

(a) 4 *Vez.* jun. 538.

(b) *Cas. Temp. Talb.* 217, 4 *Bro. P. C.* 281. And to Mr. Cox's note, 3 *P. Wms.* 401.

(c) 2 *Str.* 1270.

1807.

—
SCOTT
against
SCHOLEY
and Another.

[484]

upon which a lease for years in the new theatre in the *Hay-market*, and the apparatus, &c. belonging to the same had been assigned, and which remains to him, after satisfying the several debts and incumbrances thereupon; and indemnifying the trustees acting under the trust deed, were liable to be taken in execution by a writ of *fieri facias* for the debt of the plaintiff, a judgment creditor? Which question in other and fewer words amounts to this, viz., whether an equitable interest in a term of years can be sold under a *fieri facias*? The sheriff's authority is derived under a writ, by which he is commanded to *cause to be made* of the goods and chattels of the defendant the sum recovered; and which sum is of course to be made *by a sale* of the things taken under the execution. If the sheriff should not be able, before his writ is returnable, effectually to execute it in this particular, he is allowed to excuse himself by returning *that the goods remain in his hands* unsold for want of buyers: upon which another writ issues, commanding him to *expose to sale* the goods so remaining in his hands unsold. The language of these writs and return evidently imports, that the goods and chattels, which are the object of them, are properly of a *tangible* nature, capable of *manual seizure*, and of being detained in the sheriff's *hands and custody*, and such also as are conveniently capable of sale and transfer by the sheriff, to whom the writ is directed, for the satisfaction of a creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold property itself is capable, and also in respect of the instrument by which the term is created and secured, (both of which are capable of delivery to a vendee) has been always held to answer the description of the writ, and to be saleable thereunder. (*Dyer* 363. a.) But no single instance is to be found in the history and practice of the Courts of common law, in which an equitable interest in a term of years has ever been recognized as saleable, (seizable of course it cannot be,) under a *fieri facias*. Besides, what locality belongs to an equitable interest, a resulting trust, for instance, in a term for years, so as to render it more fitly the subject of execution and sale by the sheriff of any one county than another? The degree of inconvenience which would attend the sale of such interests by the sheriff, although it would in strictness afford no argument against an ascertained legal power of the sheriff on such a subject, is a sufficient reason why the

[485]

Court

1807.

SCOTT
against
SCHOLEY
and Another.

Court should anxiously watch the extension of such power in a case in any respect doubtful. What means, in any degree adequate, has the sheriff of taking an account of the actual amount of the incumbrances thereupon, or of ascertaining the extent of the indemnities which the trustees may be intitled to claim? The sale of such an interest, if it were to be made at all by the sheriff, must necessarily be made under circumstances of still greater ignorance and uncertainty as to its value, than attend sales of any other description of property; and not only without any legal means of delivering a present possession of the thing sold, but in general without having even the type or instrument of any legal interest whatsoever, present, or future, in the subject of such sale, to exhibit to the sight, or deliver to the hands of a purchaser. It has indeed been urged in argument, as an inconvenience on the other side, if such equities of redemption in chattel interests shall be held not to be saleable under an execution; that, by means of a mortgage of the largest leasehold property for the smallest sum imaginable, such property might be effectually protected and withdrawn from the legal claims of every creditor. But the inconvenience in the case put does not extend beyond the necessity, which such a step would occasion, of resorting to a different remedy, to be applied in another court, upon a bill to be filed by the judgment creditor in such other court, for the purpose of obtaining it. In a Court of Equity he might be let in to redeem such mortgage incumbrances as stood in the way of his common law remedy by execution: or he might have a decree for the sale of the mortgage term itself, in satisfaction of his rights as an execution creditor. *Shirley v. Watts*, *Atk.* 200. is an authority for this purpose: as is also the case of *Burdon and Kennedy*, 3 *Atk.* 739. In the case of *Lyster v. Dolland*, reported in 3 *Bro. Chan. Cases* 480., and 1 *Vez. jun.* 431, Lord *Thurlow* was at last of opinion that an equity of redemption of a term could not be taken in execution; though at first, under an apprehension that the language of the 10th *sect.* of the statute of frauds applied to such a case, he had inclined to hold otherwise. But the very silence of that statute, which, while it expressly introduces a new provision in respect to *lands and tenements* held in trust for the person against whom an execution is sued, says nothing as to trusts of chattel interests, affords a strong argument that those interests were meant to continue in

[486]

1807.

SCOTT
against
SCHOLEY.
and Another.

the same situation and plight, in respect of executions, in which both freehold and leasehold trust interests equally stood prior to the passing that statute. In the absence therefore, of any authority in favour of the sale of such an equitable interest under a common law execution against goods, we are of opinion, upon the grounds already stated, that the sheriff's return of nulla bona in this case, where the defendant in the execution had no other property besides the trust property in question, was not a false return; and of course that the verdict which has been obtained by the plaintiff against the sheriff in this case, must be set aside, and a new trial granted.

[487]

Saturday,
June 6th.

The Mayor, Aldermen, Bailiffs, and Citizens of
CARLISLE against BLAMIRE and TYSON.

The devisee of the equity of redemption, (the legal fee being in a mortgage,) is not liable in covenant, as assignee of all the estate right, title, and interest of the original covenantor. Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incor-

porated by divers names of incorporation, and at the time of making the indentures by A. B. declared on, were known by a certain other name, by which name A. B. granted to them a certain watercourse, and covenanted for quiet enjoyment: held that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken on that fact.

said

said city called the *City Mills*; rendering the yearly rent of 3*l*. And *G. Denton* thereby covenanted for himself, his heirs, &c. with the said then mayor, &c. that he, his heirs or assigns, or any other person or persons whatsoever claiming by, from, or under him, should not at any time thereafter divert or obstruct &c. any part of the said water granted as aforesaid, &c. By virtue of which grant the said citizens by their name of incorporation above mentioned became, and from the making of the said grant hitherto have been lawfully entitled, &c. and the said mayor, aldermen, bailiffs, and citizens still of right ought to have the benefit of so much of the river *Caldew* as is granted to them, &c. The declaration then alleged that on the 1st of *February* 1798 *all the estate, right, title, and interest of the said G. Denton* of and in the said lands in the indenture mentioned, called *Dentonholme*, came to and vested in the defendants by assignment thereof; by virtue of which assignment they entered and became seised thereof in fee. And then it assigned for breach, that the defendants wrongfully and injuriously kept and continued a certain weir before then wrongfully and injuriously erected across the river *Caldew*, near the *City Mills*, and higher up in the stream, and diverted the water, &c. whereby the mills became less serviceable, &c. The defendants, after craving oyer of the indenture, pleaded, 1st, that it was not the deed of the said *G. Denton*; 2dly, that the citizens of *Carlisle* were not at the time of making the said indenture, nor ever have been, a body corporate in deed or in name by the name of the mayor, aldermen and capital citizens of the city of *Carlisle* in the county of *Cumberland*; 3dly, the like plea, omitting the latter words in the county of *Cumberland*; 4thly, that the citizens, &c. were not at the time of making the said indenture, nor have ever been known by the name of the mayor, aldermen, and capital citizens of the city of *C.* in the county of *C.*; 5thly, the same as the last omitting the latter words in the county of *C.*; 6thly, that *all the estate, right, title, and interest of G. Denton* in the said lands called *Dentonholme* did not come to and vest in the defendants by assignment. There were other pleas denying the alleged breach in different ways. Replication to the 2d plea, that the citizens of the city of *Carlisle* at the time of making the said indenture were a body corporate in name by the name of the mayor, aldermen, and capital citizens of the city of *C.* in the county of *C.* To the 3d plea, the like replication, omitting

1807.

The Mayor,
&c. of
CARLISLE
against
BLAMIRE.

[488]

[489]

1807.

The Mayor,
&c. of
CARLISLE
against
BLAMIRE.

the latter description, "in the county of C." To the 4th and 5th, that the corporation was not known by the respective names therein mentioned : on which issues were joined.

At the trial before *Sutton B.* at *Carlisle* in the summer of 1806, a deed was produced from the corporation chest of the 10th of *November* 1654, between *George Denton*, of the one part and *Thomas Monk*, mayor, and the aldermen and capital citizens of the city of *Carlisle* in the county of *Cumberland*, of the other part; being the conveyance referred to in the declaration. The defendants objected to the variance between the name and description of the corporation in the deed, and in the declaration : which objection was overruled. They then submitted, before the merits of the cause were entered into (a), that the action was improperly brought against them, as assignees of *all the estate, &c. of George Denton*; the same being vested in *J. Wilson* as mortgagee in fee (b); and the defendants being only seised of the equity of redemption, as devisees in trust under the will of *Lucy Dixon*, the heir of *Denton*. And they proved the indenture of mortgage; and rent paid to *Lucy Dixon*, as the owner of the equity of redemption of these premises during her life-time, and to the defendant *Tyson* as her representative or devisee since her decease. Upon this evidence the learned Judge being of opinion that the plaintiffs had failed in proving a material averment in their declaration, directed a nonsuit. In *Easter* term last

[490]

Park and *Littledale* shewed cause against a rule for setting aside the nonsuit. As to the first point; the corporation sue by their present corporate name of the *mayor, aldermen, bailiffs, and citizens* (c) of *Carlisle* upon a grant made to the *mayor, aldermen, and capital citizens* of *Carlisle*, who are *primâ facie* a

(a) It appeared in the course of the discussion of the case at the bar, that the defendants were trustees under the will of *Lucy Dixon*, widow, deceased, inter alia, of *Denton Mill* near the river *Caldew*; which is supplied by a cut from the river higher up than the corporation dam. That immediately below that cut was a weir, which was kept up by the trustees, and which, it was alledged by the corporation, wrongfully obstructed the flow of water to their mills.

(b) It was agreed in the argument that the mortgagee was not in possession.

(c) They were incorporated by this name by a charter of the 13 Car. 1, about 17 years before the deed in question.

different

1807.

The Mayor,
&c of
CARLISLE.
against
BLAMIRE.

different body; and the issue is, whether at the time of that grant the citizens of *Carlisle* were a body corporate by the latter name; the proper evidence of which would have been the charter of incorporation, or secondary evidence of it, if lost or destroyed. But as that would not have answered the purpose, the plaintiffs relied on the grant itself, as evidence, at least against persons claiming under the grantor, that such was their corporate name at the time. But however this might have been evidence that the corporation were then *known* by such a name, if the issue had been whether they were known by the one name as well as the other; it is no evidence that they were in fact *incorporated* by the name mentioned in the deed. And where the misnomer of a corporation is in a material part of their description, advantage may be taken of it even on the general issue, as in the case of the corporation of *Lynne (a)*. There the corporation, by the name of the mayor and burgesses of *Lynne Regis, &c.* sued upon a bond given to them in that name by the defendant's testator: and a special verdict was found stating their true name of incorporation to be *Major et Burgenses burgi domini Regis de Lynne Regis*. And after much consideration the Court held the action to be well brought; because it was in sense and substance the same name, though different in words. But it was agreed that if the variance had been substantial, (as in this case it must be admitted to be;) omitting one integral part, and miscalling another; it would have been fatal. A private person making a deed to others by a corporate name is no evidence at all that they are a corporation: and there can be no estoppel in such a case against the heirs of the grantor contesting their ancestor's grant; for then the cases upon the validity of such grants to corporations by wrong names, which have been held void, could never have arisen. These are collected in 2 *Com. Dig. Capacity*, B. 5. Estoppels must be reciprocal: but if the corporation had been sued by the defendants by the same name, they would not have been estopped from saying that they were not a corporate body by that name. 2dly, They insisted that the averment in the declaration, that *all the estate, &c.* of *G. Denton* in the lands came to the defendants, was disproved by the evidence that the legal fee was vested in the mortgagee, and the defendants were

[491]

1807.
 —
 The Mayor,
 &c. of
 CARLISLE
 against
 BLAMIRE.

[492]

only devisees of the equity of redemption. In *The Earl of Derby v. Taylor* (a), where lessees for lives granted *all their estate*, &c. to the defendant *for 99 years, if the lives should so long live*; this not being an assignment of the *freehold*, which therefore remained in the original lessees, though no more than a mere nominal interest, was holden not to be an assignment of the *whole* estate in them, so as to enable the reversioner, after the lives dropped within the term, to maintain covenant against the assignee for not delivering up the premises in good repair. It was indeed considered in *Eaton v. Jaques* (b) that the assignee of a term, assigned by way of mortgage, with a clause of redemption, not having taken actual possession, could not be sued for rent, as assignee of *all the estate*, &c. of the original lessee and mortgagor. But besides that that case seems to have been shaken in *Walker v. Reeves* (c), which followed soon afterwards; and has since been questioned by Lord *Kenyon* in *Westerdell v. Dale* (d), and in *Stone v. Evans* (e); it does not follow that the owner of the equity of redemption is liable as assignee of *all the estate*, &c. because a mortgagee was held not to be so. Perhaps it may be said that neither of them have the *whole* estate; but if either have, it must certainly be that one who has the whole legal estate, according to *Plunket v. Penson* (f). And the corporation are not without their remedy; as they may have an action on the case against any wrong-doer, for obstructing their watercourse.

[493]

Upon the first point, Lord *Ellenborough* C. J. said, that the question was whether the corporation, being, as was admitted by the pleadings, a corporation by prescription, and having had various names of incorporation, might not have had the corporate name attributed to it by the grant at the time it was made? And that the deed, as far as it went, was evidence to shew, at least as against the parties claiming under the grantor, that the corporation was then known by the name by which he had granted the watercourse to it; especially as this was not encountered by any other evidence. And *Lawrence* J. observed that the issue was, whether the corporation were known by a certain name at the time when the ancestor, under whom the

(a) 1 *East*, 502.

(b) *Dougl.* 455.

(c) Referred to in *Dougl.* 461. n.

(d) 7 *Term Rep.* 312.

(e) *M.* 39 G. 3. cited in *Turner v. Richardson*, 7 *East*, 341.

(f) 2 *Atk.* 290.

defendants claim, granted the watercourse to it: then surely the deed of that ancestor describing it by that name must be evidence against those who claim from him, that the corporation was then known by that name. Upon this point therefore the Court told the counsel for the plaintiffs that they need not trouble themselves; but should confine their answer to the second objection.

Cockell Serjt., *Wood*, *Holroyd*, and *Scarlett*, in support of the rule, relied upon the authority of *Eaton v. Jaques* (a) as in point, that a mortgagee cannot be charged as assignee, upon a covenant running with the land, until he has taken possession; which distinction reconciles all the authorities. And though that case has sometimes been doubted, it has never been overruled. It was admitted in *Walker v. Reeves*, after deliberation: the Court there considering a mortgage, not like an absolute assignment, but as a mere security for money: and it has been since recognized in *Jackson v. Vernon* (b), and in *Chinnery v. Blackburne* (c). The principle of the law too is with this distinction. At common law the party took nothing by a feoffment without livery of seisin; and a conveyance to uses vests (d) nothing till attornment of the tenant in possession; though that, when made, may relate to the date of the conveyance. So the mere assignment of the lessee does not destroy the privity of estate between him and the lessor; but he still continues liable in *debt* upon the reddendum, (which is a local action founded on the privity of estate, and referable either to the county where the land lies, or where the deed was executed:) unless the lessor accept the assignee as his tenant, which is equivalent to attornment in other cases; after which indeed the privity of estate between the lessor and the original lessee is gone, though the latter be liable on his express covenant. For which they cited *Bellasis v. Burbreck* (e) *Thrale v. Cornwall* (f). *Patterson v. Scott* (g), *Thursby v. Clant* (h). All which shew that something more is necessary to give the action against the

1807.

The Mayor,
&c. of
CARLISLE
against
BLAMIRE

[494]

(a) *Dougl.* 455.(b) 1 *H. Blac.* 114.(c) *B. R. E.* 24 *G.* 3. cited *ib.* 117.(d) Sed vide *Anon. Cro. Eliz.* 46. and 2 *Blac. Com.* 332-6. and stat. 4 & 5 *Ann. c.* 16. s. 9 and 10.(e) 1 *Salk.* 209. and 1 *Ld. Ray.* 270.(f) 1 *Wils.* 165.(g) 2 *Str.* 776.(h) 1 *Saund.* 240.

1807.

The Mayor,
&c. of
CARLISLE
against
BLAMIRE.

assignee than the mere assignment; and that both the original parties must agree before the relative situation of either can be altered. If this were not so, the greatest injustice would be done. An assignee of a lease must discharge himself from covenants running with the land, by making a secret mortgage or assignment of the legal estate, though still continuing in possession and enjoying the profits: and the lessor, knowing nothing of such a conveyance by the assignee, his lessee, would be defeated of his remedy on the covenant against him by surprize. Upon principle, therefore, as well as upon authorities, a mortgage is considered as nothing more than a pledge: and until the mortgagee enter into possession, the mortgagor is considered as complete owner, with respect to all other persons. And if the mortgagee be not liable on covenants running with the land; until entry, it follows that the mortgagor continuing in possession remains liable, inasmuch as he cannot by his own act deprive the covenantee of his remedy.

[495]

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment.

This was a motion to set aside a nonsuit before Mr. Baron Sutton at Carlisle, at the last assizes for the county of Cumberland, in an action of covenant brought against the defendants, "as assignees of *all* the estate, right, title, and interest" of one George Denton in certain grounds called *Dentonholme*," which G. Denton heretofore, by an indenture dated in the year 1654, had granted to the mayor, &c. of Carlisle so much of the river or water of *Caldew*, running along his lands and grounds called *Dentonholme*, as should be sufficient for the grinding of corn and grain at all times at their mills; with certain other liberties and powers for the use and advantage of those mills: and had covenanted that he, his heirs, and assigns, &c. should not at any time or times hereafter turn, divert, straiten, or obstruct, or cause to be turned, diverted, straitened, or obstructed, any part of the said water granted as aforesaid. The breach was assigned in the defendants having, after these lands and grounds had vested in them by assignment, wrongfully and injuriously maintained and continued a weir or dam, before then wrongfully erected and placed in and across the river *Caldew*, which diverted the water to the prejudice of the plaintiff's mills. To this breach the defendants, amongst other pleas, pleaded in bar, that "*all the estate, right, title, and interest of the said Geo. Denton,*

1807.

The Mayor,
&c. of
CARLISLE
against
BLAMIRE.
*[496]

Denton, of and in the said lands and grounds called, &c. did not come to and vest in the defendants by assignment thereof," in manner and form as the plaintiffs had alleged. Upon this an * issue was joined. I forbear to state any of the other pleas, and the questions arising thereupon, as the Court has already disposed of them, upon the argument which took place in the course of last term, in favour of the plaintiffs. The question which the Court then reserved for its further consideration, and which was the point upon which the nonsuit at the assizes proceeded, is, whether this action were well brought against the defendants, as assignees of "*all* the estate, right, title, and interest of *Geo. Denton*," the covenantor; it appearing that one *Jonathan Wilson* was, at and long before the time of the breach of covenant complained of, mortgagee in fee of the lands called *Dentonholme*; the defendants being only seised of the equity of redemption thereof, as devisees of one *Lucy Dixon*, the heir of *G. Denton*. Rent also appeared to have been paid to *Lucy Dixon*, the owner of the equity of redemption, in her life-time, and to the defendant *Tyson*, as her devisee, after her decease. The learned judge was of opinion that, under the circumstances stated, the allegation in the plaintiffs' declaration, that the defendants were assignees of *all* the estate, right, title, and interest of *George Denton*, the covenantor, was not well proved, and the plaintiffs were nonsuited accordingly. And indeed, considering that the whole legal estate in the premises was, before and at the time of the breach of covenant in question, vested in *J. Wilson*, the mortgagee: and that the defendants, the devisees, were not assignees of any part of that *legal* estate therein which formerly belonged to *G. Denton*, the covenantor; but entitled to the mere equity of redemption thereof; it is impossible to say that the defendants were assignees of the estate of *G. Denton*, within the sense and meaning of the terms in which this issue is framed: and which terms respect that description and quality of estate alone, namely, legal estate, in virtue whereof parties are at all liable to actions of covenant, as assignees. Upon this view of the subject it is unnecessary to consider, whether *Wilson*, the mortgagee in fee, could, as such, be deemed liable upon this covenant, as assignee of the estate of the grantor *Geo. Denton*; and of course equally unnecessary upon this occasion to impugn or confirm the doctrine laid down in this Court in the case of

Eaton

[497]

1807. *Eaton v. Jaques, Dougl. 455.* For whether a mortgagee, who has not entered, be, or be not liable to an action of covenant as assignee: it is quite clear that the devisees of an *equitable* estate, (which is the only character which can be ascribed to the defendants upon this record) are not so. Upon this short ground, therefore, we are of opinion that the nonsuit must be sustained.

The Mayor,
&c. of
CARLISLE
against
BLAMIRE.

As to the point which was urged on the part of the plaintiffs, that the mortgage may be considered as void, as being a conveyance within the stat. 13 *Eliz. c. 5.* "devised and contrived" of fraud, covin, &c. to the end, purpose, and intent to delay, "hinder, or defraud a creditor of his just action, damages," &c.; it is sufficient to say, that the suggestion of any fraudulent or covenous contrivance or purpose, in respect to this mortgage, between the parties thereto, is perfectly gratuitous, and that it rests upon no apparent foundation of fact whatsoever. It does not however follow from what has been laid down, that the plaintiffs are remediless, in respect to the injury they may have sustained: it is competent to them, in part, to redress their own injury, by abating the nuisance which has been erected to the prejudice of their possessory rights. And although that privity of legal estate may be wanting, which will enable them to charge the defendants as assignees, in an action of covenant; they may still, in an action upon the case, if the facts will warrant it, recover against the defendants, as strangers and wrong-doers, a compensation for any prejudice done to the exercise and enjoyment of such legal rights, as to the plaintiffs may be entitled to claim and exercise, and have heretofore enjoyed, under the deed in question: or they may maintain an action on the covenant against the personal representative of *Geo. Denton*, the covenantor, if such representative can be discovered. At present, however, the rule nisi for setting aside the nonsuit in this case must be discharged.

[498]

1807.

The King *against* The Inhabitants of CHATHAM.Saturday,
June 6th.

UPON an appeal to the sessions against an order of Justices removing *Sally Burgoyne*, widow, from *Ashford to Chatham*, both in the county of *Kent*, the order was confirmed, subject to the opinion of this Court on the following case :

The pauper was married to her late husband *Robert Burgoyne* in the parish of *Clerkenwell*. A considerable time after their marriage, her husband went to live in the parish of *Chatham*, where he exercised the trade of a cordwainer, sometimes as a master, and sometimes as a journeyman. But the pauper did not know whether he acquired any settlement in *Chatham*, or any where else. But knew that her husband more than once received relief from the parish of *Chatham* : that he was at one time a fortnight, at another a longer period in the workhouse of the said parish on account of illness ; and that he died in the said workhouse, and was buried at the expence of the parish. During all the times the said *R. Burgoyne* was so relieved by the parish of *Chatham* he was resident in that parish ; but the pauper, *Sally Burgoyne*, never resided with him there (a), and never received relief from that parish, or gained any settlement there in her own right ; nor did she know where her settlement was. The appellants produced no evidence : but relied upon the insufficiency of this evidence to support the order. The sessions were of opinion that this was sufficient evidence of *Robert Burgoyne*, the husband, being a settled inhabitant of the parish of *Chatham*, and therefore confirmed the order.

Giving parish relief to a pauper within the parish is no evidence of his settlement there. In the instance in question the relief was administered at one time for a fortnight, and at another time for a longer period in the parish workhouse.

[499]

Bolland, in support of the orders, endeavoured to distinguish this case from *Rex v. Chadderton* (b), because there was only one act of relief there to the pauper by the parish, while he resided in it, which might well be considered as casual relief, and therefore no evidence of his settlement there. And he admitted that he could not avail himself of *Rex v. Wakefield* (c), as an authority in point to the present case ; the relief having been there

(a) It was explained in the course of the argument, that she resided in the same parish, but not with her husband.

(b) 2 East, 27.

(c) 5 East, 335.

1807.

The KING
against
The Inhabi-
tants of
CHATHAM.

[500]

given by the parish, which was on that account fixed with the settlement of the pauper, while he was residing in another parish; and therefore it could not be attributed to their relief of him as casual poor. But he contended that the repetition and duration of the relief given in this case, without any removal of the pauper, furnished a much stronger inference against the parish, of the acknowledgment of the pauper being their parishioner, and could less be deemed *casual*, than the single act of relief in the first mentioned case. That if this were not evidence which it was at least competent for the sessions to consider, the same objection might be made to any continued course of relief; which afforded the strongest presumption of settlement in the parish administering it.

Pitcairn contra, insisted that the act of giving relief, which it was as much the duty of the parish to administer to casual poor standing in need of it, as to their own parishioners, could not be considered as any evidence of the pauper's settlement there, unless it appeared clearly and unequivocally to have been administered as to a parishioner. That without saying that no continuance of relief could furnish such an interference, it was enough to say that no such inference could fairly arise from two instances, when it was determined in *Rex v. Chadderton* that one instance was not sufficient. The relief here was confined to the pauper himself, and was not extended to his family, and therefore carried more the appearance of casual relief. If a repetition of such assistance furnished evidence of settlement against a parish, it might be attended with injurious consequences to the poor.

[501]

Lord ELLENBOROUGH C. J. On subjects of this sort it is important that there should be one uniform rule, as far as is consistent with law; and the rule having been laid down by Lord *Kenyon* in the *King v. Chadderton*, that the bare fact of giving relief to a pauper within the parish was no evidence of his settlement there, because it might be given to him as casual poor, it is proper to abide by it. In that case indeed the relief was only administered once; and it becomes necessary to consider whether its having been administered more than once or several times alters the case, and differs this in substance from the other; for each instance in itself might not be evidence of the settlement, and yet it might be difficult to say that several instances might not furnish the conclusion. At the same time, however, it is to be observed, that though the relief were given for any length of time

time, the inference may either be that the party receiving it was a settled inhabitant, or that his settlement could not be known. But that would bring it to an alternative case, on which the sessions might draw their own conclusion; and the difficulty would still exist. Upon the whole therefore it appears to me, as the better rule to adopt, that it does not amount to evidence of the settlement. And there would be great impolicy in admitting it to have any weight; for if the parish officers, by giving relief to a pauper, were to be making evidence against themselves, as to his settlement in their parish, it would make them perform their duty to casual poor with great reluctance. And therefore it is more consonant to humanity and policy, and to the rule of law laid down by Lord *Kenyon*, to say at once that it is no evidence of the settlement, than to leave it as a matter of inference in each case.

The other Judges concurring,

Order of Sessions quashed.

1807.

The KING
against
The Inhabitants of
CHATHAM.

[502]

HOLMES and Another *against* RAINIER.

Tuesday,
June 9th.

THE plaintiffs, as executors of Rear-Admiral Sir *Hugh Christian* brought this action against the defendant, Rear-Admiral *Rainier*, for money had and received and on an account stated since the death of the testator: and at the trial before Lord *Ellenborough* at *Guildhall*, a verdict was taken for the plaintiffs for 2700*l.* subject to the opinion of this Court on the following case: with liberty to refer to the several proclamations (a)

A flag officer at the *Cape of Good Hope* sends a ship of his squadron within the limits of another flag officer's command in the *Asiatic* seas, for the spe-

cial purpose of getting her repaired; and the ship, after going there and completing her repairs in the manner directed by the latter officer, and receiving an order from him to convoy certain ships on her return to her former station; while executing such order, being accidentally separated from her convoy, took a prize, within the limits of the flag officer's command in the *Asiatic* seas, but in the course of re-joining her original flag officer: Held that the latter was not entitled to the flag officer's 1-eighth share of the prize; his command over the ship being suspended while she was out of the limits of his own, and within the limits of another command.

(a) By the proclamation of the 27th of *January* 1797, his majesty directs the distribution of prize thus; the whole of the net produce

VOL. VIII.

D d

" being

1807.

HOLMES
and Another
against
RAINIER.

[503]

in the present and late king's reign, respecting prize-money, as part of the case. The action was brought to recover 1-8th of a prize, claimed to be due to Rear-Admiral *Christian* under the king's proclamation of the 27th of *January* 1797. The prize ship *Angelique* was taken near *Prince of Wales's Island* in the *East Indies*, within the limits of the command of R.A. *Rainier*, on the 8th day of *July* 1798, by his majesty's ship *L'Oiseau*, Captain *Linzee*. In 1797 Rear-Admiral *Pringle* was commander in chief of the king's ships at the *Cape of Good Hope*, and the defendant was commander in chief in the *Asiatic Seas*. The *L'Oiseau* was part of the squadron under the command of Rear Admiral *Pringle*; and on the 22d of *June* 1797 was sent by him to the *East Indies* to be repaired; there being no possibility of repairing the ship at the *Cape*; with orders to return without loss of time, and join him at the *Cape*; and by letter dated the 22d *June* 1797, he requested Rear-Admiral *Rainier* that the ship might be docked at *Bombay*. Captain *Linzee* arrived with his ship in *August* 1797 at *Madras*, where Rear-Admiral *Rainier* then was; reported his arrival to him, and received from him the following orders on the 8th, 26th, and 29th of *August* 1797 (a). (On the 8th.) You are hereby directed to put yourself in his majesty's ship *L'Oiseau* under my command until further orders, and follow such orders as you shall from time to time receive from me for his majesty's service. And in case the ship you command shall be at any time detached from me on a particular service, on joining me again, you are to make a particular report of your proceedings in the form of a log book, instead of the usual mode of journal." (Signed) *P. R. &c.* (On the

"being first divided into eight equal parts, the captain or captains of
"any of our ships of war who shall be actually on board at the taking
"of any prize shall have 3-8th parts. But in case any such prize shall
"be taken by any of our ships, &c. under the command of a flag or
"flags, the flag officer, or officers being actually on board, or directing
"and assisting in the capture, shall have one of the said 3 8th parts; the
"said 1-8th part to be paid to such flag or flag officer in such proportions, &c., as aftermentioned, &c." See the proclamation more at large in the case of *Harvey v. Cooke*, 6 *East*, 226.

(a) The substance only of the orders is here given.

26th.)

1807.

HOLMES
and Another
against
RAINIER.

[504]

26th.) “Whereas Rear-Admiral *Pringle*, commander in chief at the *Cape*, has by letter dated the 22d of *June* 1797, requested that his majesty’s ship *L’Oiseau* under your command should be docked at *Bombay*; but as the passage to that island at this time of the year is both difficult and dangerous, &c. you are therefore hereby directed to proceed to *Calcutta* for that purpose, and there get such repairs done, as shall be agreeable to the instructions received from Rear-Admiral *Pringle*. You are to procure vouchers for the works, &c. and also of all disbursements, for which you are to give bills on the proper officers, &c. and you are to take a duplicate of every disbursement for the information of your commanding officer, and also remit a counterpart thereof to me. On your arrival at *Calcutta*, you are to acquaint the Governor-General therewith, and request his assistance, &c. When ready for sea, you are to make the best of your way to join Rear-Admiral *Pringle* at the *Cape of Good Hope*, or the officer commanding there for the time being; waiting a reasonable time if necessary to take such ships under your convoy as may apply for your protection. And whereas his majesty’s ship *Orpheus* is proceeding to the same port by my orders in a state of distress, you are to keep company with her until her arrival there; and, unless there should be a very pressing occasion for the immediate service of the ship you command, to allow her the preference of docking, &c. You will herewith receive a copy of Captain *Hill*’s orders, to which you are to pay all due attention. In case there should be a necessity for your proceeding to sea together, after your mutual repairs are effected, from the alarm of enemy’s cruizers being on the coast, or any other purpose of sufficient importance to prevent you from returning to your station; always advising with his excellency the Governor-General as above directed; you are to take Captain *Hill* under your orders in absence of any senior officer.” (Signed) *P. R.* &c. (On the 29th) “Notwithstanding what is contained in the preceding order, you are, when fit for sea, with four months provision, to proceed from *Calcutta* to this road, to receive my further orders: completing your provisions,” &c. (Signed) *P. R.* &c. Captain *Linzee* proceeded according to these orders to *Calcutta*, where after many delays he completed the repairs of the *L’Oiseau*. On the 7th of *April* 1798, R. A. *Rainier* wrote to Captain *Linzee* the following letter

[505]

1807.

—
HOLMES
and Another
against
RAINIER.

ter, which Captain *Linzee* received at *Calcutta*. “ *Suffolk, Tellycherry Road, April 7th, 1798*, Sir, I have received a copy of your letter of the 11th ultimo, in answer to which I acquaint you that provided this should find you in the river of *Bengal*, or at sea, in company with the ships mentioned in Mr. Secretary *Barlow*’s letter of *March 7th*, or with any other ships bound to the *Cape of Good Hope* or *England*, you are to make the best of your way with them to join your commanding officer; otherwise you may proceed to *Madras* road for the purpose mentioned in your letter, and where you will receive my orders for your future conduct.” (Signed) &c. *P. R.* As soon as the repairs were completed Captain *Linzee* sailed in the *L’Oiseau* from *Calcutta*, for the purpose of re-joining his commander in chief at the *Cape of Good Hope*; taking under his convoy, according to the same letter, several homeward bound *East Indiamen*. From stress of weather the *L’Oiseau* was compelled to leave the *East Indiamen* at sea, and bear away for *Prince of Wales’s Island*, where she made the capture of the *Angelique*, in the *Asiatic Seas*, within the limits of Rear Admiral *Rainier*’s command, and sailed with her for the *Cape*, where the *Angelique* and cargo were duly condemned as prize and sold; and the flag 1-8th has been since received, as before stated, by the defendant. During all the time Captain *Linzee* was at *Calcutta*, he communicated the progress he made in repairing the ship, the obstacles he met with, and all other circumstances, to Rear-Admiral *Rainier*, who sent copies of his letters to Rear-Admiral *Pringle*. Captain *Linzee* also communicated to Rear-Admiral *Rainier* the progress of his voyage to *Calcutta*, and the ships he had under his protection. He did not make such communication to the commander in chief at the *Cape*; the distance between the places being 1100 leagues; but on his return to the *Cape* he delivered to Sir *H. Christian*, commander in chief at the *Cape*, vouchers of all his disbursements on account of the aforesaid repairs; the bills for which were drawn in Captain *Linzee*’s own name. Orders were issued for the recall of Rear-Admiral *Pringle* from his command at the *Cape of Good Hope* on the——and received by him on the——. Rear-Admiral *Christian* was appointed to succeed him, by orders dated 9th *September 1797*, and arrived at the *Cape*, and took upon himself the actual command before the capture in question, and was in such command at the time of the

[506]

the capture. The respective seniority of these three admirals was as follows: 1. Rear-Admiral *Pringle*, 2. R. A. *Rainier*, 3. R. A. Sir *Hugh Christian*. The question for the opinion of the Court was whether the plaintiffs were entitled to recover? If they were, the verdict was to stand: if not, a nonsuit was to be entered.

1807.

HOLMES
and Another
against
RAINIER.

Dampier, for the plaintiffs, referred to Lord *Keith v. Pringle*(a) to shew that Rear-Admiral *Christian*, who succeeded R. A. *Pringle*, after the latter had detached *L'Oiseau* from the *Cape* for the purpose of getting repaired, with orders to return again to his station, had the same right to the prize taken after his succession to the command by that ship on her return towards the *Cape*, as R. A. *Pringle* himself would have had, if he had retained the command. And then stated the question to be shortly this, whether the commanding flag officer on one station, who sends a ship of his squadron within the limits of another distinct command, for a particular purpose, be entitled to the 1-eighth of a prize taken by that ship within those other limits; or whether it belong to the flag officer within the limits of whose command it is so taken? In arguing which for the plaintiffs, he relied on the ship having been detached from the *Cape* for a special purpose, in the execution whereof the captain was all the time acting in obedience to his original commander; and after that purpose executed he was, in obedience to the same order, upon his return to his proper station, in the course of which the prize was taken. That this was not inconsistent with the captain's subjection to the temporary and collateral commands of R. A. *Rainier*, while he was within the limits of his command; and therefore the case might have been different if the prize had been taken under the actual direction or assistance of the latter. But that throughout the correspondence, R. A. *Rainier* recognizes that Captain *Linzee* was acting under the commands of the flag officer at the *Cape*, which he does not take upon him to revoke, but gives his own orders with reference to the original purpose so far as circumstances would admit of. That R. A. *Pringle* was alone responsible for sending the ship within the limits of R. A. *Rainier's* station, and not the latter; and that the flag

[507]

(a) 4 *East*, 262.

1807.

HOLMES
and Another
against
RAINIER.
[508]

officer's share of the prize, where he does not in fact direct or assist in the capture, is meant as a reward for his responsibility. That the words of the proclamation, "*directing and assisting in the capture*," were considered in *Lord Nelson v. Tucker* (a) to be used in a large sense; and that it was enough if the capture were made by a detached ship while acting in pursuance of the order of her original flag officer.

Holroyd, contrâ, referred to the case of the *Orion* (b) to shew that a prize taken by a ship during a temporary suspension of the original command under which she was acting, though not totally separated from such command, precluded the original flag officer's claim to the 1-eighth: and, as he was proceeding to argue, transferred it to the flag officer under whose temporary command the prize was taken; though that being the case of a detached ship afterwards receiving distinct and separate orders from the admiralty, no question arose as to any other flag officer's share, but the whole was decreed to the captain.

On this part of the case however the Court gave no opinion; Lord *Ellenborough* C. J. saying that it was a very different question whether R. A. *Rainier* were entitled, in case R. A. *Christian's* executors were not; which question it was not necessary to decide at present.

[509] Lord ELLENBOROUGH C. J. then continued.—It is clear that the plaintiffs are not entitled to recover as representatives of Sir *Hugh Christian*, who was neither on board Captain *Linzee's* ship at the time of the capture, nor virtually directing or assisting in it. Captain *Linzee* was indeed originally under the command of the flag officer at the *Cape*; but his ship had been sent out of that station, and within the limits of another commander, for the special purpose of obtaining repairs. When therefore the ship was sent out of the limits of the *Cape of Good Hope* station, there was a suspension of all command of the flag officer there, actual or virtual; and so it continued until she returned again within the limits of the same command. It might have been another question, if the commission granted to the commander in chief at the *Cape* had expressly authorized him to detach ships beyond the ordinary limits of that station for a special purpose; but there is no evidence of that sort laid before us.

(a) 4 *East*, 252, 8.(b) 4 *Rob. Adm. Rep.* 362.

1807.

HOLMES
and Another
against
RAINIER.

It is sufficient therefore to say that the plaintiffs are not entitled to recover the 1-eighth flag share; and it is unnecessary to decide whether Rear-Admiral *Rainier* is entitled to it under these circumstances.

GROSE J. agreed that it was unnecessary to decide now upon R. A. *Rainier's* right to this share. It is sufficient to say that the plaintiffs are not entitled. There is nothing in the proclamation to give the 1-8th share of the prize to the flag officer at the *Cape*. The capturing ship was not under his command at the time, and the prize was taken out of the limits of his station; and nothing is stated of the terms of his commission, to shew that his authority extended beyond those limits for any particular purpose.

LAWRENCE J. The plaintiffs are not entitled to recover under the terms of the proclamation unless they can shew that the prize was taken by a ship under the command of R. A. *Christian* at the time; without which it cannot be said that he was directing or assisting in the capture, to entitle him to the flag officer's share. The question then is whether he were entitled to share a prize taken out of the limits of his command by a ship which had been under the command of the flag officer at the *Cape*, and by him dispatched out of those limits upon a particular service within the limits of another commander? If there be nothing in the terms of his commission to entitle him, we can look only to the king's proclamation; in construing which I think we must consider that the command of the flag officer at the *Cape* was suspended during the time that the capturing ship was out of his limits and within the limits of another command. Suppose R. A. *Christian* had sent orders to Captain *Linzee*, to return to the *Cape*, and that R. A. *Rainier*, within whose limits Captain *Linzee* was at the time of the capture had ordered him to remain there, whose order was he to obey? The case shews that while within those limits he received his orders from R. A. *Rainier*, and paid obedience to them. Whether the latter acted properly in employing Captain *Linzee* in any other service than that which he was sent within those limits to perform is another question, with which we have no concern.

LE BLANC J. I think R. A. *Christian* is not entitled to the flag officer's share, because the prize was not taken by a ship

1807.

HOLMES
and Another
against
RAINIER.

[511]

under his command at the time. When Captain *Linzee's* ship went within the limits of R. A. *Rainier's* command, she was bound to take her orders from him, and she did so. For he ordered her to take under her convoy the homeward bound *Indiamen*, and she was performing this service when she was driven by stress of weather from the other ships, and compelled to bear away for *Prince of Wales's Island*, where she took the prize. The case must therefore be taken as if she had taken the prize while convoying those ships; for it happened when she was only separated from them by accident.

Postea to the Defendant.

Tuesday,
June 9th.

HAYTON and Another, Assignees of FAIRLESS, a
Bankrupt, *against* JACKSON and Another.

The stat.
34 G. 3. c. 68.
s. 15. reciting
that by the
laws in force,
upon any al-
teration of

IN trover for the ship *Mary*, which was tried at the Sittings at *Guildhall* before the Lord Chief Justice, a verdict was taken for the plaintiffs for the value of the ship, subject to the opinion of this Court on the following case. Previous to and property in any vessel in the same port to which she belongs, an indorsement on the certificate of registry is required to be made; enacts that such indorsement shall be made in the form therein expressed, and shall be signed by the vendor, &c. and a copy of such indorsement shall be delivered to the registering officer, or otherwise the sale shall be utterly null and void: and such officer is required to make entries thereof on the affidavit on which the original certificate was obtained, and in the book of registry, and to give notice thereof to the commissioners of customs. Then s. 16. provides that if any vessel shall be at sea, or absent from the port to which she belongs, when such alteration in the property shall be made; so that an indorsement on the certificate cannot be made; (assuming that the certificate is always with the ship;) then it substitutes a bill of sale to be made in lieu of the indorsement on the certificate; requiring the same delivery of a copy, and the same entries and notice thereof, as were required for the indorsement of the certificate by their prior section; but that within ten days after the vessel's return to her port, the indorsement on the certificate, &c. shall be made as before required. Held that the provisions of the two sections comprehend every transfer of property in a ship; and that a bill of sale executed by a sole owner of a vessel belonging to the port of *Sunderland* to vendee residing in *London*, at a time when the vessel was in the port of *London*, was void for want of complying with the requisites of one or other of those sections: neither of them having been complied with: and that it was not sufficient for the vendee to have complied with the requisites of the stat. 7 & 8 W. 3. c. 22 s. 21. which requires a register de novo upon any transfer of property to another port, and that the former certificate shall be delivered up to be cancelled.

at

at the time of the execution of the instrument annexed (a), dated the 31st of *August* * 1805, *Fairless*, the bankrupt, who resided at *Bishop Wearmouth* in the county of *Durham*, was the sole registered owner of the ship *Mary*, then belonging to the port of *Sunderland*, where she was duly registered; and he, being then indebted to the defendants, residing in *London*, in 700*l.*, agreed to sell and they agreed to purchase the said ship, then in the port of *London*, for 1,200*l.*; and Mr. *Gray*, a solicitor at *Stockton*, was appointed by *Fairless* to prepare a proper transfer of the ship to the defendants. *Gray* accordingly prepared the said instrument, and also a copy thereof, and the form of the indorsement as after-mentioned to be made on the register, and sent them to *Fairless*, with instructions for executing the instrument, and delivering the copy to the collector of the customs of *Sunderland*. The defendants, on the 31st of *August*, paid to *Fairless* 500*l.*, and he executed the said instrument, but did not then deliver, nor has at any time since delivered the said copy to the said collector. On the 29th of *August* 1805 the ship arrived at the port of *London*; and on the 30th her original register, pursuant to directions given by *Fairless* to the captain, was delivered by him to the defendants in *London*; who took possession of the ship, and converted her to their own use; and sent the original register to *Fairless*, who made the following indorsement thereon: "Be it remembered, "That I, *M. Fairless* of *Bishop Wearmouth*, &c. have this day

1807.

HAYTON
and Another
against
JACKSON.

*[512]

[513]

(a) This was an indenture, made on the 31st of *August* 1805, between *Fairless*, therein described as of *Bishop Wearmouth* in the county of *Durham*, and the defendants, described as merchants of *London*; whereby, after reciting that *Fairless* was the sole owner of the ship *Mary*, intended to be thereby assigned, and that by a certificate of registry under the hands and seals of the proper officers of the customs of the port of *Sunderland*, dated the 15th of *July* 1803, it appeared that the ship had been duly registered at that port; which certificate was as follows: (setting it out in words and figures according to the usual form, and in which the ship is described as the *Mary* of *Sunderland*, and is stated to have been duly registered at that port:) and reciting also that the defendants had contracted with *Fairless* for the purchase of the ship for 1,200*l.*: it was witnessed that in pursuance of such agreement and in consideration of that sum, *Fairless* sold and assigned to the defendants "the said ship *Mary*, now on a voyage from "the port of *Sunderland* to the port of *London*, &c.

" sold

1807.

HAYTON
and Another
against
JACKSON.

"sold and transferred all my right, share, or interest in the ship *Mary*, mentioned in the within certificate of registry to *T. and W. Jackson* of *London*, merchants. Witness my hand " this 31st of *August* 1805. Signed in the presence of." *Fairless* duly executed that indorsement in the presence of two witnesses, and transmitted it to the defendants; but did not then deliver, nor has at any time since delivered the said copy to the said collector. On the 9th of *September* 1805 the bill of sale executed by *Fairless*, and the original certificate of registry granted to him, and which purported on the face of it to be of the ship *Mary*, belonging to the port of *Sunderland*, with the said indorsement thereon, were exhibited by the defendants to the collector and comptroller of customs in *London*; and the said certificate was delivered up to the commissioners, and cancelled, and registry de novo obtained, and a certificate thereof granted, purporting to be of the ship *Mary* of *London*, and taking notice that the said certificate granted at *Sunderland* had been cancelled. The defendants have since employed the ship as a ship belonging to the port of *London*. On the 11th of *September* 1805 the collector of the customs at *Sunderland* received the following letter, signed by the collector of the customs at *London*. "Sir, The certificate of registry granted at " your port the 16th of *July* 1803 for the ship *Mary*, R. S. " master, was this day delivered up and cancelled, and the said " vessel registered de novo at this port. 9th *Sept.* 1805. " Yours, &c. *W. Reade*, S. C. Custom-house, *London*." In consequence whereof, on the said 11th of *September* the collector of *Sunderland* caused the following memorandum to be indorsed on the oath, upon which the original certificate of registry was obtained, and also to be entered in the book of registry there. "Registered de novo at the port of *London* 9th *September* 1805." The said oath, with the said indorsement thereon, and the book of registry, are public documents to which any person may have access on applying for that purpose. On the 29th of *September* 1805 *Fairless* committed an act of bankruptcy; upon which a commission was afterwards issued against him, and he was duly declared a bankrupt: and the plaintiffs are his assignees, under an assignment made the 21st of *November* 1805. A copy of the indorsement so made on the original certificate of registry was not at the time *Fairless* became

1807.

HAYTON
and Another
against
JACKSON.

became a bankrupt, nor has since, been delivered to the persons authorized to make registry and grant certificates of registry in the port of *Sunderland*, nor any entry thereof indorsed on the oath or affidavit on which the original certificate was obtained, nor any notice thereof given to the commissioners of the customs, nor any memorandum of the same made in the book of registry at the port of *Sunderland*, nor any copy of such bill of sale delivered to the persons authorized to make registry and grant certificate of registry, nor any entry thereof indorsed on the said oath or affidavit, nor any notice of the same given to the commissioners of the customs, otherwise than as before mentioned. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover in this action? If they were, the verdict was to stand; if not, a verdict was to be entered for the defendants.

Holroyd, for the plaintiffs, said, that whether the ship were to be considered at the time of the transfer, as a ship *in the same port to which she belonged*, within the 15th section; or as a ship *absent from such port*, within the 16th section of the stat. 34 Geo. 3. c. 68.: in neither case had the requisites of the statute been complied with: for neither a copy of the indorsement upon the original certificate of registry had been delivered to the person authorized to make registry, and grant certificates of registry in the port of *Sunderland*; which is required by the 15th section to be done by the party to the transfer; without which the sale is declared to be utterly null and void: nor was a copy of the bill of sale so delivered, nor any entry thereof, indorsed on the oath or affidavit; nor any notice of the same given to the commissioners of the customs, as is directed by the 16th section, in case of the transfer of a ship absent from the port to which she belongs. To this purpose the case of *Bloxham v. Hubbard* (a) is directly in point. He afterwards argued that this was to be considered as a ship absent from the port to which she belonged at the time of the transfer; and therefore that the requisites of the 16th section should have been complied with. The assignment itself considers her as a ship at sea, though she were in fact in the port of *London* at the time of the transfer. But the port to which a ship belongs is ascer-

[515]

(a) 5 East, 407.

1807.

—
HAYTON
and Another
against
JACKSON.

[516]

tained by stat. 26 *G. 3. c. 60. s. 5.* to be that “from and to which she shall usually trade; or being a new ship, shall intend to trade; and at or near which the husband or acting owner usually resides.” There is nothing inconsistent with this provision in the stat. 7 & 8 *W. 3. c. 22. s. 21.*; which directs that there shall be a registry *de novo* upon any transfer of property in a ship to another port: because that only applies to what is to be done in the port to which the ship is so transferred. But the latter statute directs certain other things to be done in the port from whence the transfer is made; which must either be taken to superinduce other things to be done in addition to what was required by the statute of *William*, or to supersede the latter altogether. The object of the Legislature was to enable the property in *British* vessels to be easily traced by public documents; which cannot be done unless some memorial of the transfer of a ship from one port to another remains upon the registry of the port to which she originally belonged. They therefore meant to comprehend every possible case of transfer within the descriptions of the 15th and 16th sections of the stat. 34 *G. 3. c. 68.* as of a ship either in or out of the port to which she belonged at the time of the transfer: and the provisions of those two sections are adapted accordingly, upon the supposition that the certificate of registry is always kept on board the ship, as it ought properly to be. Therefore where the ship is *in* the port to which she belongs, the transfer of property is to be made by indorsement on the certificate of registry; a copy of which is to be delivered to the proper officer of that port to enable him to make the necessary entries on the original affidavit and in the book of registry, kept as public documents in the same port, and to give notice thereof to the commissioners of the customs. On the other hand, where a transfer is made of a ship *absent from* her port; so that, in the language of the 16th section, an indorsement *on the* (a) certificate cannot be immediately made, (the certificate of registry being supposed to be absent with the ship,) the copy of the bill of sale is to be delivered to the same officer who is to make the same entries thereof, and give the same notice, as

[517]

(a) By mistake in the printed act it runs thus, “so that an indorsement or certificate cannot be immediately made,” &c. vide *Heath v. Hubbard*, 4 *East*, 120.

he

he was required to do of the indorsement on the certificate in the former case. But according to the construction contended for by the defendants, if the ship were absent from her port at the time of the transfer, but had left her certificate of registry on shore, it would not be necessary to comply with the requisites either of the 15th or 16th sections, as not being a case within either; which would be a manifest absurdity.

1807.

HAYTON
and Another
against
JACKSON.

Richardson, for the defendants, rested their title upon the stat. 7 & 8 W. 3. c. 22. s. 21. which provides for the case of a transfer of property in a ship (*i. e.* of the whole ship) to another port, by requiring a registry *de novo* of her in the port to which she is so transferred, and a delivery up of the former certificate to be cancelled; both which were done in this case on the sale of the ship to the defendants, who were merchants residing at the port of *London*. The same clause of the act provides for the case of a partial alteration of property in the same port, by the sale of one or more shares only: which sale is required to be acknowledged by indorsement on the certificate of registry before two witnesses. The former part of the provision remains unaltered by any of the subsequent statutes. But the stat. 26 Geo. 3. c. 60. s. 16. reciting in the very words of the latter branch of the statute of *William*, that the provisions made in the said act, "touching the indorsement on certificates of registry in case of any alteration of the property in any ship in the same port to which she belongs," had been found insufficient; for remedy enacts, that in every such case, besides the indorsement required by the said act, there shall also be indorsed on the certificate certain other things there mentioned; and that the vendee shall also deliver a copy of such indorsement to the registering officer, who is to indorse an entry thereof on the original affidavit on which the original certificate was obtained, and also to make a memorandum of the same in the book of registry, and give notice of it to the commissioners of the customs. Then the stat. 34 Geo. 3. c. 68. s. 15 & 16. refers to the same branch of the statute of *William* which was the object of the stat. 26 Geo. 3. namely, "an alteration of property in any ship in the same port to which she belongs," on which s. 15. recites that by the laws now in force "an indorsement is required to be made;" and then it enacts that such indorsement shall be made in the manner therein prescribed. And then the 16th section comes by way of

[518]

1807.

HAYTON
and Another
against
JACKSON.

of *proviso*, "that if any ship shall be at sea or absent from the port to which she belongs at the time when *such alteration* of the property shall be made as aforesaid, so that an indorsement on the certificate cannot be immediately made," then something else is to be done. Still this refers to cases where an alteration in the property is to be made in the *same* port, and where this is to be notified by indorsement on the certificate of registry: but no such indorsement is required by any statute to be made where the whole property is transferred to *another* port; which is the case provided for by the first branch of the statute of *William*, where such transfer is to be notified by delivering up the original certificate to be cancelled, and registering the ship *de novo*, as was done in this case. This construction of the 16th section of the stat. 34 *Geo. 3.* reconciles all the provisions of the several acts: and is further warranted by the very terms of the section; which do not comprehend every absence from the port to which the ship belongs, but only an absence, so that no indorsement on the certificate of registry can be immediately made; and therefore would not comprehend an absence like that which occurred in this instance, where the ship being in another port at the time of the transfer, an indorsement might still have been made on the certificate at the time of the transfer; and as little would it apply to a case where the certificate had been left on shore in the port to which the ship belonged, though the ship itself were absent. Then the object of the registration being the notoriety of the ownership of *British* vessels, the registration *de novo* at the head office in the port of *London*, whither notice is to be sent in all cases, will answer the purpose as effectually as the method insisted on by the plaintiffs. At any rate, this is distinguishable from *Bloxham v. Hubbard* (a); and from *Moss v. Charnock* (b); for in each the transfer was made while the ship was at sea and no indorsement could be made on the certificate; and therefore the case came within the words at least of the 16th section of the stat. 34 *G. 3.* Neither is this case within the prohibition of the 4th section of the stat. 26 *G. 3. c. 60.* that no registry shall be made, or certificate thereof granted in any other port than that to which the ship properly belongs; for after the ship was transferred to persons residing in the port of

(a) 5 *East*, 407.(b) 2 *East*, 399.

1807.

HAYTON
and Another
against
JACKSON.
[520]

London, that was the port to which she properly belonged. (*Lawrence J.* asked how the sale of the ship to persons in *London* could be said to be a transfer of the ship to that port, within the terms of the 4th section of the 26 G. 3., which describes the port to which the ship shall be said to belong as the port "*from and to which she shall usually trade,*" or, "*being a new ship, shall intend to trade ; and at or near which the husband, &c. shall usually reside ?*") The trading may be understood as of a concurrent act with the register de novo. But if the clause will not admit of that interpretation, it is a difficulty which must apply to every case of a transfer to another port, which may be made without any change of property, by the original owner's changing his place of residence from one port to another ; which of course could not be meant to be prohibited.

Lord ELLENBOROUGH C. J. The forms of the act of the 34 Geo. 3., required to be observed in transferring the property in a ship from one person to another, have not been complied with in this case, and therefore the property remained in the bankrupt at the time of the bankruptcy, and passed by the commissioners' assignment to the plaintiffs. All cases of transfer of property, as they affect ships in or out of the port to which they belong, are contained within the provisions of the 15th and 16th sections of that act. If the ship were in the same port at the time of the transfer, then an indorsement is required to be made in the form therein expressed ; which form is as applicable to a transfer of the whole, as of aliquot shares of a ship, "*which shall be signed by the person or persons transferring the property of the said ship,*" &c. ; and a copy of such indorsement is to be delivered to the proper officer ; otherwise the sale is to be utterly null and void : and the officer is required to cause an entry thereof to be indorsed on the affidavit on which the original certificate of registry was obtained, and also to make a memorandum of the same in the book of registry, and forthwith to give notice thereof to the commissioners of the customs. Then the 16th section, contemplating that the ship might be at sea or absent from her port at the time ; and contemplating the probable consequence, that her certificate of registry would be on board her, as the constant consequence ; in which event the requisition of the former clause could not be complied with ; provides that, notwithstanding such absence of the ship and of the certificate, the property may still

[521]

be

1807.

HAYTON
and Another
against
JACKSON.

be transferred by bill of sale ; and requires that the same copy shall be delivered, and entries made, and notice given, of the bill of sale, as had been before required in the case of the indorsement on the certificate ; and that within ten days after the vessel shall return to the port to which she belongs the indorsement shall be made, and the other requisites complied with in the manner before directed. In the present case the indorsement on the certificate might have been made, as well as all the other requisites of the act complied with, at the time of the transfer, the ship being then in the port of *London* ; but the parties have not done it ; and therefore they have not done all that they might have done in compliance with the statute. But it is contended that on this very account the case is not within the 16th section ; because the ship was not at sea, nor so absent from the port to which she belonged, as *that* the indorsement on the certificate could not have been immediately made : and then what is the conclusion drawn ? that because the indorsement might have been then made, though the ship were absent from her port, neither that nor any other of the requisites of the act are to be complied with : construing the words *so that*, &c. as a condition ; which it is not ; but only a provision for a particular case where it was considered that the indorsement required could not be made. It is sufficient to state the argument in order to answer it. If such a construction were made, it would defeat all the objects of the Legislature. But in putting the construction which I have done, I have confined myself to the fair and literal meaning of the words taken altogether, and promote the object of the Legislature, which was to notify in the port to which the vessel belonged at the time, that all the requisites, which the Legislature have deemed necessary for ascertaining the ownership of *British* vessels, had been complied with before she was transferred to any other port ; in order that the title to the ship may be traced from port to port, as well as in the same port. And this agrees with the interpretation which we put upon these acts in *Bloxham v. Hubbard*. Here the parties have proceeded per saltum to the head office to get a registration de novo, instead of going through the intermediate steps required by the stat. 34 Geo. 3.

[522]

GROSE J. agreed. The object of the Legislature, in requiring the several things to be done which are mentioned in the 15th and

and 16th sections of the act, was to enable the public to trace from port to port to whom the property in *British* ships belonged: and those requisites not having been complied with in this instance, the property did not pass out of the bankrupt.

LAWRENCE J. The registration *de novo* does not make any difference in the question, which is a question concerning the transfer of the property in the ship. The statute of *William* requires a registration *de novo* in two cases; 1. upon changing the name of a registered ship; 2. upon any transfer of the property to another port. Such a transfer may take place without any change of the property to another; the property continuing in the same owner. The object of the legislature there was to provide for the transfer of property in a ship from one port of registry to another; but it does not direct the mode in which the transfer of property from one man to another in another port is to be made: that direction was supplied by the stat. 26 *Geo.* 3. and 34 *Geo.* 3. The latter provides for the two cases where the ship at the time of the transfer is in the port to which she belongs, and where she is absent from it; and the regulations are adapted accordingly. In the one case, where she is in port, an indorsement is required by the 15th section to be made on the certificate of registry, a copy of which is to be delivered to the proper officer, on pain of annulling the sale if either be omitted; and the officer is required to cause an entry thereof to be indorsed on the affidavit on which the original certificate of registry was obtained, and also to make a memorandum of the same in the book of registry, and give notice to the commissioners of customs. The other case contemplated was where the ship was absent from her port at the time, when the Legislature considered that the captain would do that which he ought to do, namely, have his certificate of registry on board with him: and then by section 16, it substitutes a copy of the bill of sale in the place of the indorsement on the certificate, still preserving the other regulations: and this is to serve till within ten days after the return of the ship to her port, when the indorsement before required is to be made and the other acts to be done as before mentioned. The object of all this is that, by referring to the documents at the custom-house, persons may know to whom the property in the ship belongs at any time. But it is argued that there is a third case, which has been omitted to be provided for;

1807.

HAYTON
and Another
against
JACKSON.

[523]

[524]

1807.

HAYTON
and Another
against
JACKSON.

namely, where a ship is transferred to another port, while she is absent from her own, but in another port; and where her certificate of registry might be obtained for the purpose of being indorsed. But that would be a very strange construction of the act; for it would in effect be saying that if a ship were absent from her own port but had left her certificate of registry there, which would enable every thing to be done which was required in any case, that ship might be transferred to another owner, and continue trading from one port to another with all the privileges of a *British* ship, without complying with any of these acts; and without the public having any means of knowing in whom the property was. This would entirely defeat the object of the Legislature, and therefore unless it were plainly expressed that such was their intention, we ought not so to construe the act. Upon the whole, therefore, I think that the property in the ship was not properly transferred by the bankrupt to the defendants, and consequently that the assignees are entitled to recover.

LE BLANC J. This is a case where a ship, at the time of the execution of the bill of sale by the bankrupt, was out of her own port of *Sunderland*, and in the port of *London*, where the vendees resided; and the question is, Whether the property of a ship so circumstanced can be transferred to purchasers residing at another port, without complying with the requisites either of the 15th or 16th section of the stat. 34 *Geo. 3. c. 68*. The provisions of the two sections were intended to embrace every case of the transfer of property in a ship. Section 15 extends to any alteration of property in the ship in the same port to which she belongs: and section 16 extends to every case where the ship, at the time when such alteration shall be made, is at sea or absent from the port to which she belongs; so that the thing required by the former section, namely, the indorsement on the certificate of registry, which is presumed to be always with the ship, cannot immediately be made; which is the manner of making the transfer when she is in port. Therefore, taking the two sections together, it is very clear what was meant by the Legislature. But it is said that the indorsement on the certificate might have been made in this case, though the ship were absent from the port to which she belonged; and therefore, not being so absent from her port as that the indorsement could not be made, it is not a case within the 16th section. But if she
were

[525]

were not so *absent*, &c. as to bring her within the 16th section, then the requisites of the 15th section ought to have been complied with: therefore, either way, the property was not conveyed out of the bankrupt in the manner required by the act of the 34th of the king.

1807.

HAYTON
'and Another
against
JACKSON.

Postea to the Plaintiffs.

The KING *against* The Sheriff of MIDDLESEX, in the
Cause of POTTER *against* MARSDEN.

Thursday,
June 11th.

THE process by original was returnable the third of *May* last, and the sheriff was ruled to return the writ; which rule expired on the 8th; and the writ not being then returned, the rule to bring in the body was taken out on the 9th, served on the sheriff on the 11th, *and expired on the 13th. The *quarto die post* was the 10th of *May*, which being on a *Sunday*, the party had time to put in bail till the 11th, on which day bail was put in, and exception was taken to them on the 12th; and they not justifying on the first day of term, an attachment was moved for against the sheriff on the next day for not bringing in the body. *Lawes* thereupon obtained a rule for setting aside the attachment, contending that until the sheriff made default, which he could not be said to do till after the time allowed for putting in bail, he could not be ruled to bring in the body: and cited *Rex v. The Sheriff of Middlesex*, 8 *Term Rep.* 258. *Espinasse*, who shewed cause against the rule, contended that the rule to bring in the body and the rule for putting in bail might be concurrent, though the sheriff could not be attached if the bail were put in and justified in time: and here, having been excepted to and not having justified, they were as no bail. All that was required in *Hutchins v. Hird*, 5 *Term Rep.* 479. was that the sheriff should not be ruled to bring in the body until the day after the expiration of the rule to return the writ; which was complied with in this case.

The sheriff
cannot be
ruled to
bring in the
body until
the time for
putting in
bail has ex-
pired.

* [526]

The Court, however, after consulting the Master, said that the sheriff could not be ruled to bring in the body until the time for putting in bail was expired.

Rule absolute.

1807.

Friday,
June 12th.MATTHEWS *against* GIBSON.

Upon the defendant's coming in to reverse an outlawry in a civil case, upon the stat. 4 and 5 W. and M. c. 18. the usual form for taking the recognizance of bail is to pay the condemnation money; and not in the alternative to pay it, or render the defendant.

CURWOOD moved for a rule to shew cause why the outlawry in this case should not be reversed, and why the plaintiff or his attorney should not pay the costs of the reversal; upon an affidavit that the place of residence of the defendant was well known at the time to the plaintiff and his attorney, and that he was amenable to the process. And the only question was whether (this being a bailable action) the bail should enter into a recognizance, in the alternative, to render the defendant, or pay the condemnation money; or singly to pay the condemnation money; in which latter form the master required them to enter into the recognizance. But this he said was only required by the st. 31 *Eliz. c. 3. s. 3.* where the outlawry is reversed for want of proclamations; and that in all other cases, in civil actions, the recognizance of bail ought to be taken upon the statute 4 and 5 W. and M. c. 11. in the alternative, to render the body, or pay the condemnation money; as in ordinary cases of appearance to the process. And he referred to *Serecold v. Hampson*, 2 *Stra.* 1178.

LAWRENCE J. however mentioned *Berwick v. Parkin*, E. 31 G. 3., and *Phillips v. Warburton*, Mich. Term. 1785 (a); by which it appeared that though the practice formerly was to take the recognizance of bail in the alternative, yet that now it was settled to be taken, to pay the condemnation money only. And the Court, after consulting with the Master, said that there were other cases, besides those which Mr. Justice Lawrence had mentioned, where the recognizance had been directed to be taken in this, which was now the usual form: and therefore they directed it to be so taken in this instance: saying, however, that if, in the result, any reason should be shewn to them for giving indulgence to the bail, they should consider it.

[528]

1807.

Saturday,
June 13th.The KING *against* BROWN.

THOMAS BROWN appealed to the sessions against a rate made for the relief of the poor of the parish of *Church Knowle*, in the county of *Dorset*; as being illegal, unequal, partial and defective; 1st, because the appellant *Brown* was therein assessed in respect of *clay pits*, for which he was not liable to be rated at all: 2dly, because *W. Pike* was also therein rated for clay pits: 3dly, because *Thomas Langford* and four other persons (naming them) were omitted to be rated for and in respect of a dairy of cows and the pasturage of lands in his and their respective occupations; although the said dairies and pasturages were situated, rented, occupied, and enjoyed within the said parish; and although the same or the occupiers thereof, in respect of the profits derived therefrom, were respectively rateable. Other omissions were also stated, upon which no question arose. On the trial of the appeal the following facts appeared. That in the parish of *Church Knowle** there are strata of potter's clay which have been opened for more than a century, and potter's clay dug and exported from thence for the supply of different potteries. The clay is found at a considerable depth under the surface of the ground. The clay pits in some instances are occupied and worked by the owners of the land; in other instances they are demised distinctly from the lands, and worked by the lessees at annual rents paid to the lessors. In neither of these instances have the clay pits ever hitherto been rated; but the lands in which they lie have been, and are rated according to their annual value, independant of the clay pits. These clay pits, in which several labourers are constantly employed, are worked at a great expence, and the profits are fluctuating, but always con-

Where the farmer is rated for the whole farm, it is no ground of objection to the rate by a third person that a dairyman, who rented under him his stock of cows to be depastured on the same land was not rated for such dairy; although it were stated in the case that the dairyman made a profit of the produce of the cows, independant of the profit made by the farmer. For though such a taking of a dairy be a taking of a tenement in law, which will confer a settlement; yet that is in respect of

the interest in the land: and the rate upon the farmer for the whole farm, includes all the profit of the land and the stock appertaining to it: or considering the cows as personal stock, distinct from the land, they are the personal stock or capital of the farmer, not of the dairyman: and the latter only makes his profit by his labour out of the capital stock of another.

The occupier of a clay pit is rateable for the same.

1807.

—
The KING
against
BROWN.

siderable. That in the same parish the occupiers of several farms, who are rated to the poor for their respective farms, let their cows to an undertenant, called a dairyman, at a certain rent per cow ; which cows by the agreement, are exclusively depastured on different grounds belonging to the occupier of the farm, at different times of the year, he being obliged to feed and maintain them without any expence to the dairyman. That the dairyman makes a profit of the milk and produce of such cows, independently of the profit made by the tenant of the farm. On these facts the sessions were of opinion, that the clay pits were rateable ; and that the dairies were not rateable : and therefore confirmed the rate ; subject to the opinion of this Court on the case stated.

[530]

On the argument of the case, it was admitted in the first instance, that the defendant was rateable for his clay pits, upon the same principle that a slate work was holden rateable in *The King v. Woodland* (a), and a lime work in *Rex v. Alberbury* (b). Upon the other point, as to the dairymen ;

Burrough and *Wollaston*, in support of the order of sessions, contended that to rate the dairymen, in respect of the profit which they make of the milk of the cows, is in effect to rate the profits of the land twice ; once in the hands of the farmer or occupier of the land, in respect of the value of his farm ; and a second time in the hands of the dairyman, in respect of the profit of the stock on the farm ; the value derived from which stock constitutes the principal part of the value of the farm itself, and without which the profit of the farmer would be greatly diminished. It is impossible to distinguish the value of the cows from that of the farm itself, on which they depend for their subsistence : upon a dairy farm the profit of the land is derived through the medium of the cows. If the farmer had kept the dairy in his own hands, it is clear that he could not have been rated for that and his land also : for it has been holden that he is not taxable to the poor rate for his stock (c). But where is the difference if the farmer, instead of selling every pailfull of milk as it comes from the cows, make a general agreement with the dairymen for the sale of the whole milking

(a) 2 *East*, 164.(b) 1 *East*, 534.(c) *The Queen v. Barking*, 2 *Ld. Ray*, 1280.

1807.

The KING
against
BROWN.
[531]

at a certain rate? It is merely a mode by which the farmer receives the profit of his farm. Great inconvenience would ensue if the different parts or sources of profit of a farm were to be rated separately: the farmer might make a similar agreement with the butcher, or with a shepherd, &c., until every particular source of profit of the farm was exhausted; and then it would follow from what is now contended for, that these several contractors, and not the farmer himself, should be rated for the profits of the farm: but the rule of rating which has prevailed is more convenient.

The Attorney General, Pell, and Moysey contrâ, said that after it had been decided that the taking of such an interest as the dairyman had in the land in this case was in law a taking of a tenement (a), so as to enable the occupier to gain a settlement by it; and that any interest in land was rateable; and that personal property producing profit in the parish was also rateable; and the dairyman being found by the case to be in possession of such an interest in the land, and in personal property so productive: it was difficult to say that he was not rateable at all; there being no question now as to the quantum of the rate, or whether the farmer may not have been over-rated in respect of the separate profits of his farm. But supposing the dairyman to have been properly omitted to be rated, in respect of his interest in the land; or at least that the appellant could not complain of such omission where another person was rated for the whole farm; still the dairyman ought to have been rated for the distinct profit which he is stated in the case to have made of the cows, independently of the profit made by the tenant of the farm; to which the objection of a double rating does not apply, as in *Rowls v. Gell* (b), and *Lord Bute v. Grindall* (c). This at least constituted part of his personal ability, in respect of which he was rateable. If the land produce a double profit to different persons, in respect of their different interests in it, there is no reason why each should not be rated for his own interest. An though it be said in *The Queen v. Barking*, that a farmer is not rateable for the stock on his farm; yet in the

[532]

(a) *Rez v. Fiddlersenithide*, 3 Term Rep. 772. and *Rez v. Tolpuddle*, 4 Term Rep. 671.

(b) *Cowp.* 451.

(c) 2 H. Blac. 266.

1807.

—
The KING
against
BROWN.

report of the same case in 16 *Vin. Abr.* 426. *pl.* 6., it is said, that if he have a superabundant stock, more than the land require, he shall be taxed for that: and this is the same thing, where an extra profit is made of the stock by another person. The poor's rate is not a charge upon the land or upon personal stock, but upon the person, in respect of his profit from either.

Lord ELLENBOROUGH C. J. The appellant complains of the rate, without shewing any grievance; because the farmer having been rated, as we must presume, for the full profits of the farm, it matters not to the appellant whether or not the rate in respect of that farm could have been better distributed by laying one portion of it on the farmer, and another portion on the dairyman: the appellant's proportion of the rate would remain the same in either case. It is said that the interest which the dairyman takes under such an agreement is a tenement in law, and gives him an interest in the land, by which he may gain a settlement: and that I do not dispute: and therefore if the dairyman, considering him, and not the farmer, as the occupier of so much of the farm as the cows were depastured upon, had been rated as such for it, I do not see what objection could have been made. But here the objection is that the farmer is rated for the whole farm, the profits of which arise principally from the stock upon it; and a part of those profits are again required to be subjected to another rate in the hands of the dairyman. But there is no objection to the rate as it now stands; and great inconvenience would ensue if the profits of different persons out of the same farm were subdivided, and a proportionable rate laid upon each, instead of one general rate for the whole on the general occupier of the whole. A farmer may make a bargain with one man to let him have a field of grass to cut, or he may let the aftermath of his meadows, some to one and some to another; and this may not only vary every year, but every month or oftener in the neighbourhood of populous towns. These are substantially the tenants of the land while their subordinate interests subsist, and either might be rated for it during such holding; but if there be one general rate made on the general occupier of the whole farm, including all these particular profits and subdivisions of interests, by which in fact he is benefited, who can say that he is injured by the rating

[533]

1807.

The KING
against
BROWN.

rating of one for the whole, rather than the several sub-tenants of those partial interests for their respective proportions, deducting the value of them from the rate upon the general occupier? And as to the convenience of the general rate for the whole, there can be no question of it. Other cases may be put; the owner of a house and garden may let the profits of his garden to his gardener, retaining the use of it in other respects, upon condition of the latter supplying his table with certain articles, or upon a rent; and though the gardener might be rated for this interest, yet if the owner were rated for his house and garden, what objection could any other person make to the rate on that account? The principle is, that the estate which has once paid shall not be made to pay again: and yet in all these cases it may be truly said that some profit is made by the sub-holder, beyond what the general occupier receives. What was said by Lord *Mansfield* in *Lord Bute v. Grindall* (a) does not contradict this; that where there was a proportion of the profits of the land rateable in the hands of the tenant, which was not rateable in the hands of the crown, the tenant was assessable for it. But here the whole having been rated in the hands of the farmer, nothing remains to be assessed in the hands of the under-tenant. It would be a different question if a farmer derived profit from stock kept on his farm but not connected with the management of it; as if he kept a large stock of cattle there, which he fed with oil cake for sale: there he would be separately rateable for it, not as stock of his farm, but as stock generally, from which he derived a separate and distinct profit. But here the dairy cows are properly speaking the stock of the farm. And as to any separate profit derived from them to the dairyman distinct from the farmer, the same might be said of a man to whom the farmer sold the milk by pails full on the premises, and who, after mixing it with water, retailed it again at a profit.

GROSE J. The question is whether the appellant has any ground of complaint. He complains of being rated too much, because certain persons renting dairies in the parish have been omitted in the rate. But it appears that though those persons be not rated, others are so, for the same subject matter; because

(a) 1 *Term Rep.* 338. and 2 *H. Blac.* 265.

1807.

The King
against
BROWN.

* [535]

the profits derived from the stock of cows on the farm have in effect been * once rated; being included in the rate upon the farmer for the profits of the whole farm of which they constitute part.

LAWRENCE J. It is contended that the dairymen are liable to be rated for their dairies on two grounds; 1st. That a dairy is a tenement, the taking and occupying of which is capable of conferring a settlement, and that every occupier of a tenement is liable to be rated in respect of it. That may be so; but the ground of appeal is that the appellant is injured by the omission of these persons in the rate. But if it appear that others are rated for the whole value of the farms, including the profits of the cows depastured on them, and that the appellant sustains no injury in any way, the ground of appeal fails. Then, secondly, it is said that the cows are personal property, and that the dairymen are liable to be rated for the profits made by such stock. But this is the stock by which the farm is rendered productive, and having been once taxed in effect, in respect of the produce, in the hands of the farmer, is the produce to be rated again, as milk, in the hands of the dairyman? By the same rule might it not be rated again as butter, and again as cheese, in the hands of the same person, on account of the additional profit which may be made of it in each of these stages? This would be carrying the principle of rating much further than it has gone before. It would be very inconvenient to parishes to subdivide the rate in the manner proposed. If a person taking the aftermath of a meadow is to be rated for it, instead of including it in the rate for the whole farm, what is to be done when this is taken, as it frequently is, by drovers of cattle, passing along the road, who depart again in a few days, and are no where to be heard of. Experiments of this sort, if carried into effect, would only introduce confusion. The amount of the rate would be the same: for if by underletting the aftermath the original renter make more of the land, he is rateable in proportion: and it will be found much more advantageous to the parishioners at large to abide by the old practice, and to lay one entire rate on the whole farm in the hands of the general occupier.

[536]

LE BLANC J. I am surprized that the sessions should have reserved any case upon the application of this appellant, when the

1807.

The KING
against
BROWN.

the only question was whether, with respect to him, this were an equal rate, or whether injustice had been done to him by the omission of the dairymen in the rate. For supposing it to be a question whether the farmer or the dairyman were in possession of the property to be rated, and that it were a case of doubtful occupation; yet when it appears that one of them has been assessed for the whole property, and that neither of them complained of the rate, what pretence can there be for setting aside or altering the rate, at the instance of a third person, who has no interest in that question, in order to decide a question of doubtful possession between the other two. Taking it, however, as a case between the farmer and the dairyman; it is true that the taking of a dairy in this manner has been held to give a settlement, as upon the taking of a tenement: but it has only been held to be a tenement, in respect of the interest in the land on which the cows are agreed to be depastured. But here the farmer has the general interest in the whole land, out of which the other interest is carved: the cows fed upon it are his own: they are his stock: the dairyman is to have the care of them, and the trouble of milking them, and the profits arising from the produce of the cows, in consideration of a certain sum which he agrees to give the farmer. Then what is this in effect more than the farmer making this profit of his land and of his stock by this general agreement with the dairyman, instead of employing his own dairyman to milk the cows, and afterwards disposing of the produce when made into butter or cheese? It is a mode of selling the milk of his cows. Then it is said that the dairyman is rateable for his personal stock: but he is not the owner of the cows; they are not his personal stock: he has no capital of his own; but he only makes a profit by his personal labour out of the capital of another person.

[537]

Rate confirmed.

1807.

Saturday,
June 13th.

The KING *against* the Inhabitants of SHERBORNE.

Silk throw-
sters working
up in their
mills the silk
of their em-
ployers sent
to them for
that purpose
are not liable
to be rated in
that respect
as for their
stock in trade

[538]

IN a rate made for the relief of the poor of the parish of *Sherborne*, in *Dorsetshire*, *W. Burnet* and *J. Andrews* were rated for *stock*, meaning *stock in trade*; against which rate they appealed to the sessions, on the ground that they were not possessed of any stock in trade rateable within that parish: and at the hearing of the appeal, the following facts appeared. That the appellants were rated for their *stock*. That it had been usual to rate persons for their personal estate within the parish. That the appellants are silk throwsters, and in possession of certain buildings and mills in *Sherborne*, in which the business of cleaning, spinning, and throwing silk is carried on by persons employed by them. That the appellants are in the course of receiving from their employers in *London* raw silk in packages, which they clean, spin, and throw, in different ways according to the directions they receive. That when it has gone through such process in their mills, they return the same silk in its improved state to their employers; charging a certain sum to them for every pound so returned, by which they make a profit after paying the wages of their workmen and other expences attending the manufacture. That they have always some silk of this description in their possession. That the said silk is never exposed to sale by them, nor is longer in their possession than is necessary to give them time to clean, spin, and throw the same according to the directions they receive. The sessions were of opinion that the appellants were not ratable for *stock*, and therefore amended the rate by striking out their names; subject to the opinion of this Court on these facts.

The Court, upon hearing the case read, said that it was impossible to call the silk the stock in trade of the appellants, who were employed to work it up. It was nothing like stock, in the sense in which it had always been understood, as the subject of rating.

Burrough and *Moysey*, who were to have contended for the rateability of the appellants in this respect, admitted that they could

could not support the proposition in this shape. And *The Attorney-General* and *Wollaston contra*, said that a blacksmith might as well be rated for a horse which was sent to him to be shod.

Order of Sessions confirmed (a).

(a) Vi. *Rex v. Dursley*, 6 Term Rep. 53.

1807.

—
The KING
against
the Inhabit-
ants of
SHERBORNE.

[539]

The King *against* The Inhabitants of ERITH.

Monday,
June 15th.

ON appeal to the Sessions from an order of justices, removing *William Harris*, his wife, and children, by name, from the parish of *Cranbrooke* to the parish of *Erith*, both in the county of *Kent*, the order was confirmed, subject to the opinion of this Court on the following case.

The respondents, in support of their case, examined the pauper, *W. Harris*; who stated that about 20 years ago, being then about 14 years old, he remembered being at *Erith* with his father from the month of *June* to the *Michaelmas* following. That they lived in a barn, having no fixed residence, but travelling the country from place to place. That he remembered being at other places before this sojourning at *Erith*. And that his father, who was now dead, had told him that he (the pauper) was born a bastard at *Erith*, and had pointed to that place as they were passing; telling him that was the place of his (the pauper's) birth. The pauper further stated that he followed the same wandering life that his father had done, and never resided permanently in any place, and had done no act to gain a settlement. The respondents also proved a search made in the books of the parish of *Erith*, and that no register of the pauper's baptism was to be found there. There was no other evidence; and the Sessions, being of opinion that this was sufficient evidence of the pauper's birth in *Erith*, confirmed the order, subject to the opinion of this Court, Whether upon the facts above stated, such evidence were admissible to prove the pauper's settlement in the parish of *Erith*?

Hearsay evidence of the declaration of a deceased father as to the place of birth of his bastard child is not admissible to prove the birth settlement of such child.

Taddy

1807.

The KING
against
The Inhabitants of
ERITH.

Taddy and *Andrews*, in support of the order. The declaration of the parent is evidence of the birth of a child: it is evidence of the *time* of the birth (*a*), so as to fix the age of the child; or to prove it born before marriage (*b*); then why not also evidence of the *place*? On a question of title in ejectment, it might be material to know whether a child were born abroad out of the king's dominions; as if alienage were set up as a defence: and would not the declaration of the parent be evidence of that fact? It stands upon the same reason as his declaration of the fact of the birth: it is the best evidence the nature of the thing will in general admit of. For who can speak as to the place of birth except those who were present at the time, and who have had the means of continuing their knowledge of the identity of the person as he grew up from infancy. This must always be best known to the parents, and probably to none others. Declarations of persons are in no instance received except as made by those who have peculiar means of information on the subject on which they speak, and no bias to distort the truth: which strongly applies to the present case, where the father could have had no interest in making this declaration as to the place of his son's birth. In *Rex v. Eriswell* (*c*), on which the court were divided, the attempt was to make the declaration of the parent evidence not merely of the fact, but of the law.

[541]

Pitcairn and *Berens* contra. There is no public convenience or policy in encouraging orders of removal, and therefore there is no reason why the strict rule of evidence should not be applied to this case. Since the argument of *The King v. Eriswell* it has been decided (*d*) that hearsay declarations of the parents as to the settlement of their children are not evidence. By the general rule all evidence must be given on oath, where the adverse party has the option of cross examining the witness. The only established exceptions where hearsay evidence is admitted are in cases of prescription, custom, and pedigree: and these

(a) *Herbert v. Tutchal*, *T. Ray*, 84.

(b) *Goodright v. Moss*, *Cowp.* 591.

(c) 3 *Term Rep.* 707.

(d) *Rex v. Nuncham Courtney*, 1 *East*, 373. *Rex v. Chadderton*, 2 *East*, 27. *Rex v. Ferry Frystone*, *ib.* 54. and *Rex v. Abergwilly*, *ib.* 63.

are founded upon necessity; for if reputation in respect of the two first, and the declarations of the family as to the other, were not admitted, all probable evidence of those facts would be excluded. But as reputation is no evidence of a particular fact, so neither can any particular or collateral fact on a question of pedigree, such as the *place* of birth of a child, be proved by the hearsay declaration of the family; for this goes beyond the exception which has been established; which is merely as to tracing the descent. And where Mr. Justice *Buller* (a) mentions hearsay evidence of the family to prove a relation *beyond the sea* dead; that must be understood merely as evidence of the death of the person, and not of the fact that he was *beyond the sea* at the time.

1807.

—
The KING
against
The Inhabitants of
ERITH.

The Court, considering that the decision of this case might affect the general question of hearsay declarations of the family in cases of pedigree, (though they thought this case went further than any of those,) directed the matter to stand over for some days; when

Lord ELLENBOROUGH C. J. delivered their opinion.

[542]

This was a case in which the question was, Whether the hearsay declaration of the father of a bastard child, as to the place of his, the bastard's, birth, were competent evidence of that fact? The only doubt which has been introduced into this case has arisen from improperly considering it as a question of *pedigree*. The controversy was not, as in a case of pedigree, from what parents the child has derived its birth; but in what *place* an undisputed birth, derived from known and acknowledged parents, has happened. The point thus stated turns on a single fact, involving no question but of locality; and therefore not falling within the principle of, or governed by the rules applicable to, cases of pedigree; and is to be proved, therefore, as other facts generally are proved, according to the ordinary course of the common law; that is, by evidence to which the objection of *hearsay* does not apply. Upon this short ground, therefore, without further adverting to the several points made in argument, we are of opinion that evidence of the father's declaration as to the birth-place of the pauper, the bastard, ought not to have been received; and of course that the rule nisi for quashing the order of Sessions must be made absolute.

(a) *Bull. N. P.* 291, 5.

1807.

Monday,
June 15th.

The KING against JAMES THEODORICK.

Where the whole corporation are summoned for a particular purpose, (e. g. to receive the resignation of a common councilman) a select body who are all present and consenting, may at the same meeting without any particular summons to them for that purpose in their select capacity, proceed to an election of a common councilman in the place of the other resigned; the power of election being in such select body, and the charter not requiring any previous summons.

*[544]

LORD ELLENBOROUGH C. J. delivered the judgment of the Court in this case, which had stood over for consideration.

This was a rule to shew cause why an information in nature of quo warranto should not be granted against the defendant, for usurping the office of one of the common councilmen of the borough of *Thetford*. The defendant had been elected to fill a vacancy in the common council, made by the resignation of one *John Theodorick*. The right of election to vacancies in the common council, under the charter, is in the mayor, recorder, (or deputy recorder,) and the coroner. The election of the defendant was made by the mayor, recorder, and coroner, *unanimously*, on the day on which *John Theodorick* had resigned, and after such resignation had been accepted at a meeting of the body at large, duly assembled, on summons, for the purpose of accepting such resignation: but (as appears to us on the affidavits) there had been no previous summons of the select body, viz. of the mayor, recorder, and coroner, for the purpose of electing a successor in the common council to the person whose resignation had been so accepted: but all of them being met as a part of the body at large, for the purpose of accepting the resignation above-mentioned, they afterwards continued together, and unanimously agreed to proceed to fill up the vacancy in the common council made by such resignation; and accordingly elected the defendant. It has been argued in support of the rule, that this election was invalid, for want of a previous special summons to the electors for the purpose of this election. And indeed if a summons of any kind had been specially required by the charter, a compliance therewith would have been strictly necessary in order to have rendered the election valid. But as the charter is silent on this head, previous summons is only necessary for the purpose of preventing an election from taking place by surprise, i. e. by some of the electors, without due means of attendance upon that occasion being equally afforded to all the others. But due and equal means

1807.

—
The KING
against
THEODO-
RICK.

means of attendance cannot be said to have been wanting, for any effective purpose, when all the electors have been actually present, and have, without objection on the part of any one of them, consented to proceed, and have in fact proceeded, to an election, and have unanimously concurred in the object of such election; as was the case in the present instance. The case of *The King v. The Mayor &c. of Carlisle* (1 Str. 385.) was strongly urged in support of the rule. The question there arose upon a return to a mandamus to restore one *Poulter* (his name in the record is *Coultherd* a capital citizen of *Carlisle*, who had been amoved by the mayor and aldermen, in whom the power of amotion resided under the charter. It appeared that the *common council*, of which body the mayor and aldermen are a part, being assembled on summons, the *mayor and aldermen* had afterwards, without having been ever summoned in the *latter character*, proceeded to exercise the power of amotion which belonged to them in that character, in respect to *Poulter*, on account of his not having attended the common council that day: and the Chief Justice (*Pratt*) is reported to have said, "That the mayor and aldermen could do no acts unless they met, only as such, upon a regular summons *for that purpose*." That, "As they had distinct authorities, they must be summoned in their distinct capacities." That as there was no summons to meet, *as mayor and aldermen only*, the consequence was, that the acts done by them in that distinct capacity were void. And the Chief Justice is stated afterwards to have delivered the opinion of the Court, that the removal in that case was not regular; for that there should have been a summons "to the mayor and aldermen to meet in their distinct capacity." And indeed if the doctrine, which is reported to have been laid down in that case, had been applied to one similarly circumstanced with the present, in respect to the attendance of all the members of which the select body consisted, it would have had great weight in deciding the question now before us. But upon looking at the facts of that case, as they are stated in the original record of the mandamus and return in the Crown-office, and with reference to which the language of the Court is to be understood, it appears that the articles of charge, upon which the amotion was founded, were exhibited against him to the mayor and *major part* of the aldermen only, (the mayor and

[545]

1807.

The KING
against
THEODO-
RICK.

[546]

major part of the aldermen then being assembled;) and that such mayor and *major part* of the aldermen so assembled adjudged him guilty, and amoved him. So that this case differs from that of *The King v. Carlisle* in the very essential circumstance, that all the electors entitled to summons, and who could by any possibility have been present upon any summons, were in fact present in this instance, and consenting to the proceeding in all its parts: whereas in that of *The King v. The Mayor of Carlisle*, a *major part* only were present; and for all that appears a majority only of such *major part* might have concurred in the amotion then in question. In the case of *Sir Chr. Musgrave v. Nevinston*, (2 *Ld. Raymond*, 1358.) which was the case of an election of an alderman by the common council at an accidental meeting; upon a trial at bar, before Lord C. J. *Pratt* and the other Judges of that court, it was held by the Court, “that in the case of such an accidental election, every member who had a right to vote ought to be present and assent.” The Court thereby clearly intimating their opinion to be, that if every member of the common council, (the elective body,) had been present, and assenting, the election would have been good: and which expressly agrees with what Lord Chief Justice *Parker* is supposed to have said in *The King v. Strangeways*, *Hil. 1 Geo. 1.* according to the statement of that case by Lord *Hardwicke* in his judgment in *The King v. The Mayor, &c. of Shrewsbury*, (*Rep. temp. Hardw.* 151.) That was a motion for an information in quo warranto for having exercised the office of capital burgess of *Bridport*. And the question was, Whether he were duly elected? The case was much debated; and it was expressly the opinion of Lord *Parker* and the whole Court, that “when the acts are to be done by a select number, notice must be given of the time of meeting; and that it is to do some corporate act; though what particular corporate act need not be specified: and in such case the acts of a majority would bind the whole body: or, if all were present, though *by accident*, and *without notice*, their acts would be good: but the acts of a majority, present *by accident*, would not be binding.” And in the case of *The King v. Wake*, 1 *Barnard.* 10. the Lord Chief Justice (Lord *Raymond*) is stated to have said on the subject of notice, “that wherever notice is given for one particular business only, the body cannot go on to other business, unless the
“ *whole*

[547]

"whole body is met, and it is done *by consent*." Upon these authorities, impugned as we now find by no direct authority to the contrary, as well as upon the reason of the thing, we think that the election of the defendant, made by the whole select body present and consenting, was well made; and that the rule nisi for an information in quo warranto against him should be discharged.

1807.

—
The KING
against
THEODO-
RICK.

ROBERTS *against* MONKHOUSE.

Monday,
June 15th.

UPON a rule for setting aside the proceedings for irregularity, the question was, Whether the service on a *Sunday* of notice of plea filed were irregular; which it was contended to be by *Wigley*; the stat 29 *Car. 2. c. 7. s. 6.* having declared void the service of any writ, *process*, warrant, &c. upon a *Sunday*. *Barrow* said that a notice of this sort was not *process*, and therefore not within the statute. And in *Walgrave v. Taylor* (a) two Judges, against one, thought that the delivery of a declaration on a *Sunday* was not within the act; such delivery being, as they said, but *quasia* notice, and as a letter; and not *process*. But by

Service of notice of plea filed on *Sunday* is void by construction of the statute 29 *Car. 2. c. 7. s. 6.* which avoids all *process*, &c. served on that day.

LORD ELLENBOROUGH C. J. all notices on which rules are made are *process* in respect to the subject-matter; not indeed *process* with respect to the writ; but *process* in respect to the rule.

Et per Curium.

Rule absolute (b).

(a) 1 *Ld. Ray.* 705.

(b) The statute having absolutely avoided the service of *process* on a *Sunday*; such service cannot be made good by any waiver of the defendant by not objecting in the first instance. *Taylor v. Phillips.* 3 *East*, 155.

1807.

Monday,
June 15th.

GORDON and OTHERS *against* SECRETAN (a).

Where an instrument is produced at the trial by one of the parties in consequence of notice from the other; which when produced appeared to have been executed by the party producing it and third persons, and to be attested by a subscribing witness; the production of it in that manner does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it.

* [549]

IN an action upon a policy of insurance on goods on board the ship *Tom*, at and from the Southern Whale Fishery until her arrival at *London*, the declaration contained an averment that the plaintiffs were interested in the subject-matter of insurance; and the defendant meaning to dispute that at the trial, gave them notice to produce certain articles of agreement between them (who were also owners of the ship) and the captain, whereby, as he contended, it would appear that the captain, (who was not a plaintiff) was interested in one-third of the neat proceeds of the cargo: and if so, the defendant, having paid more than enough into court to cover the shares of these plaintiffs, would have been entitled to a verdict, unless the plaintiffs were entitled to recover the remainder of the sum insured as trustees for the captain; which would depend upon the construction of the articles. In pursuance of the notice the instrument was accordingly produced at the trial by the plaintiffs, when there appeared to be two subscribing witnesses to it; and therefore the plaintiffs insisted that the defendant could not give it in evidence without calling one of those witnesses to prove it. And Lord *Ellenborough* being of that opinion, the plaintiffs recovered.

The Attorney-General moved at the beginning of the term for a new trial, 1st, on the ground that the instrument * coming out of the hands of the plaintiffs, parties thereto, upon notice to produce it, was not necessary to be proved by one of the subscribing witnesses according to the rule laid down in *Rex v. Middezy* (b). If the deed had been read, the other question would have arisen upon the terms of it: and on this he contended, that though the legal interest of the whole cargo might be in the plaintiffs, the ship owners; yet they having agreed, as he contended, to pay one-third of the neat proceeds to the cap-

(a) I heard the motion made for a new trial, but was not in court when the rule was finally disposed of; but was informed of the result by the counsel in the cause.

(b) 2 *Term Rep.* 41.

tain

1807.

 GORDON
against
 SECRETAN.

tain and crew, by way of wages, it was not competent for the plaintiffs to insure the whole; because they would be then interested in the destruction of the cargo: for if the whole arrived, they were only entitled to two-thirds of it; but if lost, they would be entitled to recover the whole from the underwriters, without accounting to the captain and crew for their one-third; as they would not be entitled to wages in case of the loss of the ship. Upon the first point,

Lord ELLENBOROUGH C. J. said that the case of *The King v. Middlezoy*, which was much questioned at the time, had been since overruled. And that it was not enough to give notice to the opposite party in a cause to produce an instrument in his hands, in order to dispense with any further proof of it by the party giving the notice; but that the production of it at the trial, in pursuance of such notice, did not supersede the necessity of proving it by one of the subscribing witnesses, if any, as in ordinary cases.

And LAWRENCE J. said that this had been so ruled by Lord *Kenyon* in a subsequent case, respecting a will, which the adverse party, in whose hands it was, had notice to produce, and did produce at the trial, when it appeared that there were subscribing witnesses to it: and Lord *Kenyon* held that the party calling for it was bound to call one of the subscribing witnesses to prove the instrument.

[550]

Lord ELLENBOROUGH C. J. added, that the case of a will shewed strongly the necessity of adhering to the strict rule of proof, and the enormity of the general proposition, that the production of an instrument by an adverse party, in consequence of a notice, dispensed with the general rule of proving its execution by a subscribing witness: for if a party were fixed with the possession of an instrument affecting his property, however questionable its execution might be, and even though he had impounded it because it was forged, or had been obtained by fraud; that, according to the argument, was to relieve the party attempting to avail himself of it from calling the subscribing witness.

The Attorney-General, after suggesting the difficulty which parties would be laid under in these cases, from their ignorance of the names of the subscribing witnesses to an instrument till produced at the trial, then offered an affidavit on the part of the

1807.

GORDON
against
SECRETAN.

defendant of his being surprized and not prepared at the trial for want of knowing who the subscribing witnesses were; relying on the case of *The King v. Middlezoy*, that the notice to produce the articles dispensed with further proof of them when produced.

[551]

Lord ELLENBOROUGH C. J. said, that there could be no objection to his taking a rule to shew cause on the ground of surprize, if ultimately that could be of any avail to him: but, as at present advised, he could see no ground of objection to the insuring of the whole interest in the cargo by the plaintiffs, the owners, who had purchased the whole: nor that it could vary the question, to shew that they had made an agreement with others to pay over to them any part of the neat proceeds of the cargo, when received. For if the ship and cargo arrived, the ship owners were at any rate liable to pay the wages of the captain and crew, whether out of the fund produced by the cargo or otherwise: and if the ship and cargo did not arrive, no wages would be due, and there could be no neat proceeds.

The Attorney-General intimated that this would in effect be an insurance of wages; which could not be made directly.

The Court granted a rule nisi; and when the case came on, they would not enter into the question as to the construction of the instrument; but after hearing *Garrow, Park, and Taddy*, against the rule; and *The Attorney-General* and *Scarlett* in support of it, who again argued upon the sufficiency of the notice to produce the instrument coming out of the hands of the adverse parties; whose instrument it purported to be, without further proof; and which distinguished it, they said, from the case of a will which purported to be executed by a third person; *the Court* made the rule absolute, on payment of costs, on the ground of surprize only; and to give the defendant an opportunity of calling the subscribing witnesses.

1807.

GOODRIGHT, on the several Demises of T. L. FOWLER, and ROBERT BURTON, *against* FORRESTER and Another.

Tuesday,
June 16th.

THIS was an ejectment brought to recover possession of a certain tenement called *Hunt's and Jones's tenement*, in *Lawley* in the parish of *Wellington* in *Shropshire*; laid in the 1st count upon the demise of *T. L. Fowler*, and in the 2d count, upon the demise of *Robert Burton*. At the trial a special verdict was found, stating in substance :

That *Richard Browne*, being seized in fee of the manor of *Lawley*, with the appurtenances, in the parish of *Wellington*, and also of a certain tenement called *Hunt's and Jones's Tenement*, in the same parish, which tenement was then parcel of the manor of *Lawley*, on the 22d of *May* 1677, by will duly executed and attested to pass real estate, "touching his real and personal estate" devised as follows : first I give to *Ann* my wife, whom I make sole executrix, " my chief capital messuage in *Lawley*, and all " lands and hereditaments thereto belonging, and all other my " messuages, lands, tenements, and hereditaments, (except here- " after excepted and by me otherwise devised,) and all mines of " iron, stone, and coal, within the lordship of *Lawley* ; with " liberty to cut and take mine wood for the said works ; to have " and hold all and every the said premises from and immediately " after my decease, until the 26th of *March* 1680, for the better " maintenance of herself and her children ; she yearly paying " unto *Robert Browne* my eldest son 40*l.* for his maintenance " during the said*term, and until the said 26th of *March* 1680." He then charged all his messuages, lands, mines, &c., and all other his fee simple estate in *Lawley* with the payment of certain legacies, to be raised thereout, after the said 26th of *March* 1680: viz. 500*l.* to each of his daughters, *Anne*, *Irephena*, and *Jane*. and 200*l.* to his daughter *Eleanora Browne*, to be paid to them as they should respectively attain their age of 21 years. And 200*l.* to be paid to his son *Simon Browne*, when he should return

The fine of a tenant for life divests the estate of the remainderman or reversioner, leaving in him only a right of entry, to be exercised either then, by reason of the forfeiture, or within five years after the natural determination of the preceding estate. And the effect of the stat. 4 H. 7. c. 24. is only to save to all the remaindermen their respective rights of entry within five years after their respective titles accrue without a subsequent remainderman being prejudiced by the laches of another remainderman, who preceded him.

But such

right of entry is not deviseable. The effect of a fine by tenant for life of parcel of a manor, the reversion of which parcel was in the tenant in fee in possession of the other parts of the manor, is to sever such parcel from the manor.

1807.

GOODRIGHT
against
FORRESTER.

[554]

to *England*: with a direction that if any of his children should die before payment, his executrix should dispose of the deceased's portion at her discretion to any of her surviving children. He also gave to his daughters *Elizabeth Dodd* and *Sarah Browne* 20*l.* each, and 10*l.* to *John Hadley* his grand child, charged upon the said premises in *Lawley*. "Nevertheless, if the said *Robert Browne*, my eldest son shall within seven years after my decease pay, or sufficiently secure to my executrix or to the said several legatees, the several sums of money devised to them, then and immediately after such payment or security given, the entire lordship or manor of *Lawley* aforesaid (excepting the estate hereby hereafter devised to the said *Anne Browne*, *Philip Browne*, and *Eleanora Browne*, in and to the tenement of them or one of them hereafter limited and appointed) shall descend to the said *Robert Browne*, my eldest son, as his lawful inheritance; to have and to hold the said manor of *Lawley*, and all other the said premises, (except as herein is excepted) to the said *Robert Browne* and the heirs of his body, &c.: and for want of such heirs, the right and reversion of all and singular the said lordship of *Lawley* to descend to *John Browne*, one other of my sons, and to the heirs of his body, &c." and so he limited the remainder of the said manor, lands, &c. to *Philip Browne*, another of his sons in tail; with the ultimate remainder to his own right heirs. "Except, and always reserved out of this present grant all that one tenement, with all and every the lands and appurtenances thereto formerly belonging, formerly known by the name of *Hunt's and Jones's tenement*, part whereof is now in my own possession, part in *W. A's*, and the residue in the possession of *T. C.* and *A. A.*: all which said last excepted messuage, lands, and premises, and every part thereof, I do hereby give and bequeath unto *Anne* my wife, *Philip* my son, and *Eleanora* my daughter, for and during the term of the natural lives of them the said *Philip* and *Eleanora*, and the longer liver of them: and after the decease of the survivor of them the said *Philip* and *Eleanora*, than the reversion and remainder of the said excepted messuage and premises to remain and to be the executors and assignees of the said *Philip* for the term of 40 years; he the said *Philip* paying to his sister *Eleanora* or her executors 100*l.* for increase of her portion." He then devised to his son *John Browne* and his heirs all his purchased lands in *Marion* in the county of *Salop*, habendum to him

him and *Anne* the devisor's wife according to the several estates and uses limited to either by an indenture of feoffment before executed by the devisor, dated the 23d of *October*, 19 *Car. 2.*; he the said *J. B.* paying the legacies and sums of money in the said deed expressed. He also gave to *Anne* his wife, or, in case of her death or marrying again, to his son-in-law *Jonas Dodd* and *Elizabeth* his wife, the tenement and land called *Colsemare*, near *Lee Hall*, in the parish of *Worthin*, and, the lease thereof, for the remainder of the term of 99 years determinable upon two lives in being, in trust for the maintenance and portion of his son *Wm. Browne*. "Item, I devise all my messuages, lands, hereditaments, and cottages in *Wellington* in *Salop*, to my son "*Richard Browne* and his heirs: nevertheless, if my eldest son "*Robert Browne* shall pay to the said *Richard Browne* 200*l.* in lieu and recompence of the said inheritance, then my will and intent is that after such payment the estate and interest of "*Richard* my son in the said messuage and premises shall determine, and from thenceforth *Robert* my eldest son shall stand seised of all and every the said messuages and premises in *Wellington*, to the use of himself and his heirs. Item, I give to the said *Richd. B.* my son, and his heirs, all my part of *Wm. Daws's* tenement in *Admaston*, in *Salop*. Item, I give to my eldest son *Robt. B.* four oxen and four cows out of my stock at *Lawley*. And all the rest and residue of my estate, goods and chattels, real and personal, at *Little Wenlock*, not formerly bequeathed, I do give and devise to my wife *Anne Browne*, whom I hereby appoint to be sole executrix of my will," &c. The testator died seised on the 1st of *June* 1677; and thereupon *Robert* his eldest son and heir entered into the manor of *Lawley*; and *Anne*, *Philip*, and *Eleanora Browne* entered into *Hunt's* and *Jones's* tenement. And *Robert Browne* being so seized of the manor of *Lawley*, and entitled to *Hunt's* and *Jones's* tenement, subject, as to the latter, to the estates, terms, and interests therein created by the said will, in *Michaelmas* term 1677, suffered a recovery of the manor of *Lawley*, the uses of which were declared to be to himself in fee. That *Robert Browne* being so seized of the manor of *Lawley*, and *Anne*, *Philip*, and *Eleanora Browne* being so seized of *Hunt's* and *Jones's* tenement with remainder to *Robert*, on the 30th of *April* 1682 *Robert Browne* made his will, duly executed and attested, and thereby devised to *T. Langley* and *C. Cludd*, all his personal estate whatsoever,

1807.

GOODRIGHT
against
FORRESTER.

[555]

[556]

1807.

—
 GOODRIGHT
 against
 FORRESTER.

soever, and all the manor of *Lawley*, messuages, lands, and coal-mines, and all other his lands, &c. in *Lawley* aforesaid in the parish of *Wellington*, in *Salop*, and also all other his messuages, lands, or tenements whatsoever in *Wellington* aforesaid, or elsewhere in the county of *Salop*, with their appurtenances, to hold to *Langley* and *Cludd* and their heirs, in trust out of the personal estate and profits of the premises, or by the sale thereof, to pay all his debts, legacies, &c. and the legacies charged on his estate by his father's will; and in case of no sale, to permit his brother *Wm. Browne*, to receive the profits of the premises during his life, with a power of jointuring a wife; and after their decease, to permit their first and other sons (if any) in succession, and their heirs, (or in default of sons, the daughters of *Wm.*) to enjoy and receive the profits. And in case of any sale, that the overplus of the sale money, &c. should be laid out in purchasing lands to the same uses, &c. And in default of issue of *William* he gave the remainder of his said estate to his brother *Richard Browne* in tail, remainder to his sister *Sarah Browne* in fee. That *Robert Browne*, the last mentioned testator, died seized on the 1st of *July*, 1682, without issue: and upon his death *Langley* and *Cludd* by indentures of lease and release of the 30th of *June* and 2d of *July*, 35 *Car. 2.*, sold and conveyed the manor of *Lawley*, with the appurtenances, to *Thomas Burton* in fee. The special verdict then found that *Ann Browne* and *Eleanora Browne* in the first will named, died on the 1st of *September* 1723, whereby *Philip Browne*, in the same will named, became sole seized for life of *Hunt's* and *Jones's* tenement; the reversion thereof belonging as aforesaid. That in *Hilary* term 7 *G. 2.* (1734) the said *Philip Brown* levied a fine sur cognizance de droit come ceo, &c., with proclamations, of *Hunt's* and *Jones's* tenement, to the use of *Wm. Forrester* and his heirs: who thereupon entered and became seized thereof. That *Thomas Burton*, being so seized of the manor of *Lawley*, and the premises sold and conveyed to him as aforesaid, upon the 28th of *November* 1735, by his will of that date, duly executed and attested to pass real estate, devised the manor of *Lawley* and all other his manors, messuages, tenements, and hereditaments to the use of *Robert Burton*, father of *Robert Burton*, one of the lessors of the plaintiff, for life; remainder to *W. Taylor* and *T. Fowler*, &c. trustees to preserve contingent remainders during the life of *R. Burton* the father;

[557]

father ; remainder to the first and other sons of *R. B.* the father successively, in tail male ; remainder to the use of the right heirs of the said *R. B.* the father. That *Philip Browne* died on the 1st of *July* 1738. And that *Wm. Forrester*, being so seized, on the 4th of *November* 1758, by his will of that date, duly executed and attested to pass real estates, devised the premises in the last count mentioned (*Hunt's* and *Jones's* tenement, to *George Forrester* in tail ; and died on the 5th of the same *November* ; on whose death *George Forrester* entered on and became seised of the same premises, and afterwards suffered a recovery of the same in *Hilary* term 1770 ; and in *Hilary* 1793 made a feoffment thereof to *V. Vickers* in fee, who in the same term levied a fine thereof sur cognizance de droit come ceo, &c. with proclamations to the use of himself in fee, and afterwards by indentures of lease and release in the same year re-conveyed the same to *George Forrester* in fee. The special verdict also stated a recovery suffered as of *Michaelmas* term 39 *Geo.* 3. with double voucher, by *Robert Burton*, one of the lessors of the plaintiff (*a*), of the manor of *Lawley*, &c. (including in the general terms of description *Hunt's* and *Jones's* tenement : and that he thereupon entered into the manor and the other premises expressed to be devised in the will of *Thomas Burton* (except the tenement, *Hunt's* and *Jones's*, in the last count mentioned), and took the rents, &c. except as aforesaid. That *Thomas Burton* died on the 13th of *February* 1735 ; and that *Robert Burton* the father died on the 24th of *June* 1803, leaving *Robert Burton*, one of the lessors of the plaintiff, his eldest son and heir at law ; who, on the 1st of *April* 1805, entered on *Hunt's* and *Jones's* tenement, in order to avoid the fine levied by *Philip Browne* and *George Forrester*, and afterwards demised to the plaintiff, &c.

This case was twice argued very learnedly and elaborately ; first in *Trinity* term last, by *Eyton* for the plaintiff, and *Abbott* for the defendant ; and the second time, in *Michaelmas* term last, by *Williams* Serjt. for the plaintiff, and Sir *V. Gibbs* for the defendant : but the Court, in giving judgment, made so compendious a statement of the arguments and answers on either side, upon the principal points on which the judgment turned ; and entered so fully into the authorities on which they were founded,

1807.

GOODRIGHT
against
FORRESTER.

[558]

(a) This was in his father's lifetime, and was left unexplained.

that

1807.

GOODRIGHT
against
FORRESTER.
[559]

that it would be superfluous to detail them. But several previous questions arose ; Whether by virtue of the words of exception, respecting *Hunt's* and *Jones's* tenement, in the devise to *Robert Browne*, the testator's eldest son, of the manor of *Lawley*, &c. the reversion of that tenement, after the death of the tenants for life and the determination of the term of 40 years for the benefit of *Philip Browne*, were undisposed of by the will, and descended to *Robert Browne* the testator's eldest son in fee ; or whether, upon the construction of the whole will, that reversion passed to the eldest son, as parcel of the manor of *Lawley*, in tail, and if not, whether it passed under the subsequent devise to *Richard Browne* ? But upon this last point it was observed by the Court, that if that were insisted on, there ought to be a venire de novo, as the question had never been submitted to the jury, whether the 200*l.* had been paid to *Richard* by *Robert Browne*, on which the devise to him depended. On the discussion of these questions the particular provisions of the will, which are shortly adverted to in the statement of the case, were commented upon, and several authorities were quoted : but in the result it became unnecessary to decide these questions, and another which arose out of the case, namely, Whether the recovery suffered by *Robert Browne* the son, supposing he was only tenant in tail of that reversion, operated to pass it. But the principal questions, and those on which only the judgment of the Court turned, were, Whether, admitting that *Tho. Burton*, who claimed by conveyances from *Robert Browne*, had at one time the reversion in fee of *Hunt's* and *Jones's* tenement in him ; such reversion were divested and turned into a right of entry or action by the operation of the fine levied by *Philip Browne* the tenant for life : and if so, whether such right of entry or action could pass by *Tho. Burton's* will, without his having made a previous entry in his lifetime to avoid such fine ?

[560]

There was also another question on the first argument, upon the effect of the recovery stated to have been suffered by *Robert Burton*, one of the lessors of the plaintiff, in *Mich. 1798*. That recovery was stated at full length in the special verdict, (the substance only of the other recovery and fines being stated ; a practice which the Court commended), because there was no deed stated to lead the uses of it : and therefore it was attempted to be argued that the lessor of the plaintiff, who appeared to vouch and entered

entered into warranty, and against whom there was judgment of recovery, was estopped to say that the estate did not pass out of him to the use of the recoveror. Though it was argued on the other side that *Robert Burton*, the lessor of the plaintiff, appeared then to be out of possession : and that it did not thereby appear, nor was found by the special verdict, that *Griffiths* and the other persons who sued out the writ were seised of the freehold at the time ; so that there was no good tenant to the præcipe : and that at any rate where no deed to lead the uses appeared, the recovery would enure to the old uses under the will of *Thos. Burton*. But no notice was taken of this latter point on the second argument. The Court took time to consider of their opinion till now, when judgment was delivered by

1807.

—
GOODRIGHT
against
FORRESTER.

Lord ELLENBOROUGH C. J.—On the trial of this ejectment at the Summer assizes for the county of *Salop* 1805, and which was brought to recover a certain tenement called *Hunt's and Jones's*, in the parish of *Wellington* in that county, the jury found a special verdict stating, That *Richard Browne* being seised in fee of the manor of *Lawley*, of which a certain tenement called *Hunt's and Jones's* was parcel, by his last will and testament in writing, duly attested so as to pass real estates, dated the 22d of *May* 1677, devised all his messuages, lands, tenements, and hereditaments, and, inter alia, the manor or lordship of *Lawley*, (excepting the estate thereby after devised to *Ann Browne*, *Philip Browne*, and *Eleanor Browne*, in and to the tenement to them, or one of them, thereafter limited and appointed,) to *Robert Browne* his eldest son, to have and to hold the same (except as thereafter excepted) to his said son *Robert Browne*, and the heirs of his body lawfully begotten, with divers remainders over. Except, and always reserved out of the said grant, all that one tenement known by the name of *Hunt's and Jones's* tenement : all which said last-excepted messuage, lands, and premises, and every part thereof, he thereby gave and bequeathed to his wife, *Ann Browne*, *Philip* his son, and *Eleanor* his daughter, for and during the term of the natural lives of the said *Philip* and *Eleanor* and the longest life of them : and after the decease of the survivor of them, the said *Philip* and *Eleanor*, then the reversion and remainder of the said excepted messuage and premises to remain and be to the executors and assignees of the said *Philip* for the term of 40 years, &c. That on the 1st of *June* 1677 *Richard Browne*

[561]

1807.

—
GOODRIGHT
against
FORRESTER.

[562]

Browne, the testator, died seized, without altering his will; and that in *Michaelmas* term 1677 *Robert Browne* his eldest son, suffered a recovery of the manor of *Lawley*, the uses of which were declared to be to himself in fee. And on the 30th of *April* 1682 made his will, duly attested to pass real estates, and thereby devised the manor of *Lawley* to *T. Langley* and *C. Cludd* and their heirs, in trust to sell; and died on the 1st of *July* 1682, without altering his will. That by indentures of lease and release, dated the 30th of *June* and 2d of *July* 1683, *Langley* and *Cludd* conveyed the same to *Thomas Burton* in fee. That *Ann Browne* and *Eleanor Browne* died in 1723, leaving *Philip Browne* surviving them, who thereby became sole seized of the said tenement called *Hunt's and Jones's* for the term of his life, with a remainder to the said *Philip* for the term of 40 years: and afterwards in *Hilary* term 7 *Geo.* 2. 1733-4, levied a fine with proclamations of the said tenement to the use of *William Forrester* and his heirs; who thereupon entered. That on the 28th of *November* 1735 *Thomas Burton* made his will, duly attested to pass real estates, and thereby devised the manor of *Lawley* to *Robert Burton* for life; remainder to trustees to preserve contingent remainders, &c.; remainder to his first and other sons in tail; which first son the lessor of the plaintiff is. That on the 13th of *February* 1735-6 *Thomas Burton* died. That on the 1st of *July* 1738 *Philip Browne* died. That on the 24th of *June* 1803 *Robert Burton*, the son and devisee of *Thomas* the devisor, died, leaving his son the lessor of the plaintiff his heir at law, who entered upon the tenement in question on the 1st of *June* 1805, to avoid all fines levied thereof. That on the 1st of *July* 1778 the term for 40 years in the premises which had belonged to *Philip Browne* expired.

This special verdict has been twice argued, and each time very ably by the counsel on both sides, and several points have been made; but it will not be necessary to notice any excepting those upon which the opinion of the Court is founded; as the other points were either abandoned in the course of the argument, or do not touch the questions, upon which the Court, after very anxious consideration, have made up their minds, and which in their judgment will determine this case. Those questions are two: first, whether the fine levied by *Philip Browne* devested the estate of *Thomas Burton* the reversioner. And, 2dly, sup-
posing

posing that it did, whether the interest which * remained in *Thomas Burton*, after the fine levied, passed by his will.

1807.

GOODRIGHT
against
FORRESTER.
*[563]

For the plaintiff it was said, that if the tenant for life levy a fine, the reversioner or remainder-man is not bound to enter till the regular determination of the preceding estate: and that the alienation of the tenant for life only accelerated the period of his, the reversioner or remainder-man's, right of entry, but did not take that right away when the life should have determined. That it is no where said, that the fine of a tenant for life turns the estate of the reversioner into a right, as the fine of tenant in tail does. That during the life of the tenant for life a fine does not affect the remainder-man. That there is a distinction between alienations which turn estates to a right, and such as do not. *Co. Litt.* 327 *b.* That there can be no disseisin, unless the freehold is taken from the tenant. *Litt.* sect. 279. *Co. Litt.* 181. *a.* ib. 153. And as the tenant for life has the freehold, he can by no act of his own, such as a fine levied by himself, be ousted of the freehold. That there is a wide difference between a man being ousted by the wrongful act of a stranger, and the levying a fine by a tenant for life, who is not turned out thereby. That supposing the fine could have the effect contended for, if it had been levied of the manor of *Lawley*, it could have no such effect, as it was levied only of *Hunt's and Jones's* tenement, which was parcel of the manor of which *Thomas Burton* was in possession: for if any rent had been reserved for that tenement to the lord, he might have distrained. *Litt.* sect. 590, 591. That a man cannot be ousted of a reversion, so long as his tenant is in possession. *Shep. Touch.* 23. That rent and common are not barred by a fine; and that they do not differ in this respect from a reversion. And for these reasons it was insisted, inasmuch as *Thomas Burton* died during the life of *Philip Browne* the tenant for life, (who had a lawful estate for his life, and during whose life *Thomas Burton* was not bound to enter for the forfeiture,) that *Thomas Burton* had such an interest as would pass by his will. And as to the case put by *Litt.* sect. 416. which was relied on for the defendant, it was said, that it is not there stated, whether the tenant for life was living during the continual claim; but that, upon comparing the text with the commentary, it would appear that he must have been dead; and therefore, that it only amounted to this, that if a party do not enter within five years

[564]

1807.

GOODRIGHT
against
FORRESTER.

years after he is bound to enter, the right will be bound : but that it was no authority to shew that the estate would be divested during the life of tenant for life. That the continual claim can only be necessary to prevent an entry being tolled : but that here *Thomas Burton* was not bound to enter during *Philip Browne's* life ; for which 2 *Vesey* 482. was cited as an authority. But if this were otherwise, it was contended on the authorities of *Roe v. Jones*, 1 *H. Black.* 30. 3 *Term Rep.* 94. *Smith v. Coffin*, 2 *H. Black. Rep.* 444. *Roe v. Griffiths*, 1 *Black. Rep.* 606. *Goodtitle v. Wood*, cited in 3 *Term Rep.* 94. and reported in *Willes* 211. that *Thomas Burton* had an interest which was deviseable.

[565]

For the defendant, it was on the other hand insisted, that the fine levied by *Philip Browne* divested the reversion of *Thomas Burton* ; leaving nothing in him but a mere right of entry ; which is not deviseable, though it may be released : and in support of that position were cited *Shep. Touch.* 325. *Litt.* sect. 347. *Co. Litt.* 214. *a.* and 268. *a.* and 48. *b.* *Perkins*, sect. 86. (edit. 1642), and Lord *Eldon's* doctrine in *The Attorney-General v. Vigor*, 8 *Ves. jun.* 282. And this latter case was distinguished from that of *Roe v. Jones*, 1 *H. Black.* 30. and 3 *Term Rep.* 94. by observing, that in that case the devisor devised *all* he had ever had ; but in this case the devisor, whose interest had been divested by the operation of the fine, had nothing left in him which he could make the subject of devise by his will. And to shew that the fine divested the remainder, *Litt.* sect. 416. and Lord *Coke's* comment on it, and *Focus v. Salisbury*, *Hardress* 401, 2. were relied on. The passage in *Littleton*, it was said, proved, that without continual claim of the tenant for life, the remainder-man in fee could not enter ; because the remainder would be divested by the fine : and that in *Focus v. Salisbury* Lord *Hale* had expressly stated, that a fine by tenant for life displaced the estate in remainder : distinguishing between a fine by tenant for years, and tenant for life : saying, that the fine of the first displaced no estate ; but that the fine of the latter did. And in answer to the argument derived from the circumstance of the fine having been levied of *Hunt's and Jones's tenement*, and not of the manor ; it was said, that the effect of the fine was to separate that tenement from the manor ; which we are of opinion, that it did ; and that the fine divested the estate of *Thomas Burton* : and that the authorities cited ; viz. *Co. Litt.* 251. 327. *b.*

and

1807.

GOODRIGHT
against
FORRESTER.

[566]

and *Focus v. Salisbury*, *Hard.* 401. are in point. And that the answer of my brother *Williams*, viz. "That a remainder-man is "not bound since the stat. 4 *Hen.* 7. c. 24. to look to his estate "till the determination of the preceding estates," is not satisfactory: for though that statute prevented the laches of antecedent remainder-men from prejudicing those who followed; as it did before the statute of non-claim 34 *Edw.* 3. c. 16.; yet it has not preserved the right of the subsequent remainder-men, by at all altering the immediate effect of the fine upon the remainders; but by giving all the remainder-men rights of entry within five years after their respective titles, &c. should accrue; and thereby preventing their rights from depending on the conduct of the person, whose right of entry accrued immediately on the forfeiture. And this position we think warranted by the following cases: *Moor* 71. pl. 192. cited in 3 *Co.* 78. b. as *Laune* and *Toker's* case. *Cro. Eliz.* 220. *Smy v. June and Others.* 2 *Lev.* 52. *Whaley v. Tankard.* And *Salvin v. Clark*, in *Cro. Car.* 157. And our opinion is, that the effect of *Philip Browne's* fine was to divest the estate in reversion of *Thomas Burton*; leaving in him only such right of entry as the forfeiture incurred by reason of the fine authorized him then to exercise: and if that should not be thereupon presently exercised by him, leaving in him a future right of entry to be exercised within five years after the determination of the estates for life, and of the remainder for the term of 40 years. As to the argument of my brother *Williams*, grounded on the position, that a man cannot be ousted of his reversion so long as the tenant for life is in the possession; it is sufficient to observe that in this case the tenant for life did not continue in possession after the fine levied; but gave to the conusee of the fine a seisin and possession adverse to the interests of the reversioner.

This brings on the consideration of the 2d question; which is, whether such *right of entry* be *deviseable*: and we are of opinion that it is not deviseable. For such right is certainly not assignable by the common law; nor does it fall within the words of the stat. 32 *H.* 8. c. 1., which are, "*having* manors, lands, "tenements, or *hereditaments*;" nor of the stat. 34 and 35 *Hen.* 8. c. 5. s. 4. which are, "*Having* a sole estate or *interest* in fee "simple of and in any manors, lands, tenements, rents, or other "hereditaments, in possession, reversion, or remainder." If the devise of *Thomas Burton* were stated upon record in any

[567]

1807.

—
GOODRIGHT
against
FORRESTER.

pleadings at common law, what description of *interest*, falling within these words, could he be stated to have had at the time of the devise? The opinion of Lord *Eldon* in *The Attorney-General v. Vigor*, 8 *Ves. jun.* 282. was certainly against it: and the case of *Roe v. Griffiths*, 1 *Black. Rep.* 606. *Goodtitle v. Wood*, *Willes* 211. and *Roe v. Jones*, 3 *Term Rep.* 94. do not shew that such right of entry is deviseable; as in those cases the devisors devised all the interest they had ever had. And Lord *Thurlow*, 1 *Ves. jun.* 255. supposed, in order to bring executory interests within the statutes of wills, that they must have been considered as *executed* by the statute of uses; which is a very different interest from a right of entry for the purpose of re-vesting a devested estate. In *Corbet's case*, 1 *Co.* 85. *b.* “For the construction of wills, “this rule was taken by the justices in their arguments; that “such an estate, which cannot by the rules of the common law “be conveyed by act executed in his life, by advice of counsel “learned in the law, such estate cannot be devised by the will “of a man who is intended by law to be *inops consilii* :” from whence it may be inferred, that out of that interest, in which by act executed in a man's life it is not possible to create any estate, no estate can be created by his will. And in *Butler and Baker's case*, 3 *Coke* 32. *a.* it is said, “without question that which a man “cannot dispose of by any act in his life shall not be taken for “any of his manors, &c. whereof he may devise two parts by “authority given him by the statute.” And in Lord *Mountjoy's case*, *Godbolt* 17. it is laid down, “that the statute of wills, “32 *Hen.* 8., that it shall be lawful, &c. to devise two parts, &c. “respects only such things as are deviseable :” but a right of entry is not deviseable; and therefore, according to the terms of the statute and the authority of that case, is not deviseable. For these reasons we are of opinion, that there must be judgment for the defendant. And whatever mischief or hardship may attend the decision of this case, or may be expected to arise from the application of the same rule to other cases, it is an inconvenience which can, if our judgment be well founded, only be remedied by positive law. And the propriety of applying such a remedy, whereby the same rights of entry and action which belong to the heir may be extended to the devisee, is a question particularly fit for the consideration of the legislature. Upon the law as it now stands, we feel ourselves obliged to give

[568]

Judgment for the Defendant.

1807.

The KING against SARAH SEALE.

Tuesday,
June 16th.

THE following conviction upon the stat. 42 Geo. 3. c. 119. against unauthorised lotteries, &c. was returned by certiorari into this court—"City and Liberty of *Westminster*, in the county of *Middlesex*; to wit—Be it remembered, that on the 4th March 47 Geo. 3. &c. **At the public office in Great Malborough-street (a), in the parish of St. James*, within the liberty of *W. &c. J. Nicholls of Picadilly, &c.* one of the overseers of the poor of the parish of *St. James*, within the said liberty, &c. comes before me P. N. Esq. one of the justices of our lord the king, assigned to keep the peace in and for the said city and liberty, &c. and giveth me the said justice to be informed, that *S. Seale, of Walker's court, &c.* within the liberty, &c., single woman, after the passing of the act (42 Geo. 3. c. 119) &c. viz. on the 15th February 1807, at the said parish, &c. did unlawfully receive and take of and from *G. May, of the said parish, &c.* 1s. 3d.; and in consideration thereof did then and there promise and agree to and with the said *G. M.* to pay to him 1l. 1s. upon a certain event and contingency relative and applicable to the drawing of a certain ticket numbered 9, in a certain unlawful game or lottery called a Little Goe; the same being a game or lottery not authorised by parliament; contrary to the said act, &c.: whereby and by force of the said statute the said *S. Seale* hath forfeited 100l. &c. And afterwards, on the said 4th of March 1807, at the public-office in *Great Malborough-street* aforesaid in the said parish, &c. the defendant is brought before me the said justice at the public-office aforesaid, by *W. C. and J. B.* two of the beadles of the parish of *St. James* aforesaid, &c. and charged before me with being guilty of the said offence contained in the said complaint and information. Whereupon I, the justice aforesaid, do now here proceed to inquire and examine into the circumstances of the case, &c. in

The Stat. 4. G. 3. c. 119. against illegal lotteries, directing the penalty to be distributed, 1-3d to the king, 1-3d to the informer, and 1-3d to the person apprehending or securing the offender; a conviction directing the penalty to be distributed as the law directs, without ascertaining to whom the last third is to be paid, (the person being uncertain) is bad. But it need not appear that there was in fact any illegal lottery, if it be shewn that the money was taken for that purpose.

* [569]

(a) It was admitted, after some discussion, that this description did not sufficiently denote that the conviction were made by one of the Police Magistrates, under the stat. 42 Geo. 3. c. 76, &c.

1807.
 —
 The KING
against
 SEALE.

the presence and hearing of the defendant. And thereupon, on the same day, &c. *at the Public-office in Great Marlborough-street, aforesaid,*" &c. The conviction then proceeded to set out the evidence given by the witnesses, whereby it appeared that the offence was committed by the defendant on the 15th of *February* last, at a house in *Walker's-court* in the parish of *St. James'*, where she was found; and that on their going there again on the 4th of *March* the defendant prevented them by force from making any further examination. That the defendant was called upon for her defence, but did not produce any evidence to prove that she was not guilty, &c. The conviction then proceeded; "And thereupon all and singular the premises being heard, &c. it manifestly appears to me, the said justice, that the defendant is guilty of the premises and offence charged upon her in and by the said complaint and information. It is therefore considered by me, &c. that the defendant be convicted, and she is by me the said justice accordingly convicted, of the offence charged upon her in and by the said charge and information; and for which said offence I the said justice do adjudge her the said *S. Seale* to forfeit and pay 100*l.* to be applied and distributed, when paid, as the law doth direct: and the said defendant is now here by me required immediately to pay such penalty of 100*l.* which she neglects and refuses to do: therefore I the said justice do adjudge the said defendant to be committed to *Tothillfields* Bridewell, there to remain for six calendar months, without bail or mainprize, and without appeal, or until such penalty of 100*l.* shall be satisfied. In witness, &c. at the Public-office in *Great Marlborough-street,*" &c.

[571]

Marryat took several objections to the conviction, the principal of which arose on the 5th section of the act; directing the penalty to be applied, one-third to the king, another third to the use of the informer or informers, and the remaining third to the person or persons apprehending or securing the offender. And the last description of persons being uncertain, he contended that the justice having only adjudged the distribution of the penalty as the law directs, without specifying to whom in particular the last third should be paid, the conviction was bad for uncertainty: and he referred to *Rex v. Dimpsey* (a) as in

(a) 2 Term Rep. 96.

point. There the objects of the distribution were certain, namely, the party grieved, and the poor of the parish; but the proportion to each was left in the discretion of the magistrate: here the proportions are certain, but the persons are not all ascertained: the principle is the same. Here also an additional inconvenience would ensue to the defendant; who cannot tell to whom to pay the penalty, in order to get discharged; and it can only be paid to those to whom it is given by the act. It is not even stated in fact who did *apprehend* or *secure* the defendant; and it cannot be implied from the term used, that she was *brought* before the magistrate by the two beadles. In *Rex v. Priest (a)* a conviction adjudging a distribution of part of a penalty, which the statute on which it assumed to be founded directed to be paid to the poor of the *parish*, to be paid to the poor of the *township*, was held void. And in *Rex v. Hall (b)* a commitment in execution on the stat. 6 G. 1. c. 48. s. 1. against cutting down ash timber trees, for not paying the penalty and *charges* of conviction, was held bad, because the magistrate had not ascertained what the amount of the *charge* was. Another objection was, that it did not appear that there was any Little Goe, &c. But it was answered that it was sufficient that the money was taken for that purpose.

1807.
—
The KING
against
SEALE.

[572]

The Common Serjeant, contra, contended that the act having directed to whom and in what proportion the respective shares should be distributed, it was enough for the conviction to adjudge that it should be distributed, as the law directs, according to *The Queen v. Barrett (c)*. And that if no persons could claim the 3d share given to the person or persons apprehending or securing the defendant, by bringing themselves within that description, that share would remain in the Crown: and that a payment to the magistrate or gaoler for the Crown would be deemed sufficient payment by the defendant to entitle herself to be discharged. But he also suggested that the two beadles who are stated to have brought the defendant before the magistrate answered the description of persons *securing* her.

Marryat in reply observed, that the act, by limiting specifically one-third of the penalty to the crown, negatived its claim to any other third: and that there was no authority given either

(a) 6 Term Rep. 538.

(b) Cowp. 60.

(c) Salk. 383.

1807.

—
The KING
against
SEALE.

to the magistrate or the gaoler to receive the third share of the persons apprehending or securing the offender. After consideration for a few days,

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

This was a conviction before a magistrate of the county of *Middlesex*, upon an information for an offence under the stat. 42 *Geo. 3. c. 119. s. 5.* made "for the suppression of games and lotteries not authorized by law." The act directs, "that where the party accused shall be convicted of the offence, and such penalties (i. e. of 100*l.*) shall not be immediately paid, it shall be lawful for the magistrate to commit the offender to prison for any space of time, not exceeding six calendar months, nor less than one calendar month, without bail or mainprize, and without appeal, or until such penalty shall be satisfied." And further directs, "that every such penalty, when paid upon conviction, shall go and be applied, one-third thereof to his majesty; one-third thereof to the use of the informer or informers; and the other third thereof to the person or persons apprehending or securing such offender or offenders." The information and evidence given in support of the same, as stated in the conviction, appear to have warranted the magistrate in drawing therefrom the conclusion he did, viz. that the defendant was guilty of the offence charged upon her. The conviction then further proceeds in these words: "It is therefore considered by me, the said justice, that the said *Sarah Seale* be convicted, and she is by me, the said justice, accordingly convicted of the offence charged upon her in and by the said charge and information; and for which said offence I the said justice do adjudge her the said *Sarah Seale* to forfeit and pay the sum of 100*l.* to be applied and distributed, when paid as law doth direct." It then proceeds to state, that she was required to pay the penalty immediately, which she neglected, and refused to do; and was thereupon committed to prison for six calendar months, &c.; in the terms directed by the act. It has been argued on the authority principally of *The King v. Dimpsey*, 2*Term. Rep.* 96, that this conviction is bad, inasmuch as it contains no adequate adjudication in respect to the penalty, so as to render it properly applicable and distributable amongst the several objects of such distribution, under the act of parliament:

[574]

1807.

—
The KING
against
SEALE.

ment : the words of the conviction being only, "*to be applied and distributed, when paid, as the law directs.*" And although a judgment, *quod convictus est, et foris faciat*, or even perhaps *quod convictus est* alone, may, as was held in *The King v. Chandler*, (*Salk.* 378.) be sufficient, where the statute, acting upon the facts stated in the conviction, is competent of itself to carry the conviction into full unequivocal execution and effect; it is otherwise where the immediate legal consequences of the conviction are made by the statute to depend upon the discretionary judgment of the Court. If therefore the punishment which is to follow upon conviction be either discretionary as to its kind; or being certain in its kind, (as a pecuniary penalty for instance,) is uncertain in its amount; or where, being certain in its amount, either the particular description of persons, amongst whom the distribution is to take place, is uncertain; or the individuals answering such particular description, and to whom shares of the penalty are to be assigned, are in any manner the subject of discretionary selection and appointment; in all such cases, the magistrate or court, before whom such conviction is had, must, at the time of the adjudication, actually exercise his or their discretion upon these particulars, and thereby ascertain what would otherwise remain wholly undecided and uncertain. In the present instance, the mere adjudication of a conviction of the offence, and of a forfeiture of the penalty of 100*l.* *to be distributed as the law directs*, leaves it wholly undecided whether there exist in this case the last of the three descriptions of persons, amongst whom the penalty is to be distributed under the act; viz. "*persons apprehending or securing the offender.*" This description is not specifically and in terms applied to any person or persons whatever on the face of this conviction: it is therefore left to be supplied by argument and inference, whether there be any such persons in this case to whom the description in the act of parliament applies; and whether the two persons, by whom the offender is stated to have been brought before the convicting justice, were understood by him, and must in legal construction be considered by us as having been meant by him to take that one-third part of the penalty, which the act assigns, *eo nomine*, to "*persons apprehending or securing the offender.*" Nor can the want of this necessary ascertainment of the objects of distribution be obviated or supplied in the

[575]

1807.

—
The KING
against
SEALE.

[576]

was suggested by Mr. Common Serjeant ; i. e. by considering the whole penalty as vested in the Crown, in the first instance, by the adjudication of the forfeiture ; and all of it as still remaining in the Crown, which does not on the face of the conviction appear to be taken out of it, and by subsequent adjudication thereof to belong to any other persons well entitled under the act to a definite portion or portions of it. For the question still recurs, whether any persons do or do not appear, upon the face of the conviction, to whom the required description properly applies : so as that, in the absence of all such persons, the whole may be considered as belonging to his majesty : a point not only material to be distinctly ascertained, as between the Crown and such parties ; but also as between the person convicted, and the several parties interested in the proportions into which the penalty is directed to be divided, with a view to the due and convenient satisfaction and payment afterwards of the penalty itself by the person convicted. On the ground therefore of the uncertainty which appears upon the face of this conviction, as to the objects of that distribution of the penalty which the act requires to take place, we are of opinion that the conviction is defective, and cannot be sustained.

Conviction quashed.

Tuesday,
June 16th.

GOULD and Others *against* ROBSON and KEYMER.

If the holder of a bill of exchange when due, after taking part payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder shall keep the original bill in his hands as a security ; such agreement amounts to giving time and a new credit to the acceptor, and discharges the indorser, who was no party to such agreement ; though the drawer might have had no effects in the hands of the acceptor.

at

at a future short date (a), which he accepted; and that until such last-mentioned bill was paid they, the plaintiffs, should keep *the original bill in their hands as a security. And the second bill being afterwards dishonoured by the acceptor, the plaintiffs, the indorsees of the original bill, brought this action on the bill against the defendants as indorsers; who resisted payment, on the ground that the plaintiffs had given time to the acceptor, by which they were discharged. To this it was answered, that the plaintiffs had only endeavoured to get as much as they could from the acceptor, which was so much in discharge of the indorsers; and that the delay that had intervened was in attempting to secure the remainder. And the plaintiffs also attempted to shew, that no injury in fact had arisen to the defendants from the delay; for that there was cross paper existing at the time between the latter and the acceptor. But this was denied by the defendants; and the evidence did not go to shew how the balance of that account stood. But, on the other ground, it appeared to Lord *Ellenborough* at the trial merely as a case of getting part payment from the acceptor, without any injurious laches on the part of the plaintiffs to the prejudice of the defendants; and under that impression a verdict was found for the plaintiffs. The above-mentioned facts were, however, afterwards brought neatly before the Court, disentangled from the collateral circumstances of the case, upon a motion for a new trial by

1807.

GOULD
against
ROBSON.
*[577]

The Attorney-General, (with whom was *Marryat*) who shewed that this amounted to a giving time to the acceptor by the holders of the bill, which precluded them from resorting afterwards to the defendants, as indorsers: for the situation of the latter was thereby altered; they not having an opportunity of enforcing their claim upon the acceptor, so soon as they would otherwise have had, if they had had earlier notice of the dishonour of the bill. And he referred to *Tindal v. Brown* (b) for the general rule, that if the holder give time to the acceptor of a bill after it is dishonoured, the indorser is thereby discharged; and to *Rces v. Berrington* (c), where it was held that an obligee of a bond with a surety (which he assimilated to the case of an

[578]

(a) *Qu.* a month.(b) 1 *Term Rep.* 167.(c) 2 *Ves. jun.* 540.

1807.
 ———
 GOULD
 against
 ROBSON. indorser who was surety to the indorsee for the acceptor) taking notes from the principal and giving him further time, without communication to the surety, discharged the latter, whose situation was thereby altered: also to *Walwyn v. St. Quintin* (a), and *English v. Darley* (b), where the entering into a new agreement with the acceptor for securing the payment of the bill was considered as a discharge by the holder of the other parties on the bill.

A rule nisi having been granted; Lord *Ellenborough* C. J. after reporting the facts, said, that his opinion had been formed at the trial upon considering this merely as a case of part payment by the acceptor; which of itself would not have discharged the indorser; but that if the holder had made any bargain with the acceptor for giving him further time for payment, as the case now appeared to be; thereby not only binding himself but all others whose names were upon the bill from suing upon it while it was in his hands; he put the indorsers in a different situation from what they were entitled to be in; and could not therefore refer back to them, when the acceptor failed to fulfil the new contract he had entered into with him.

[579]

Park and *Bowen* however still pressed to shew cause against the rule; alleging that the acceptor having no effects of the drawer's in his hands, but this being merely an accommodation bill between those two, no injnry could arise to the drawer or indorsers from the delay; which differed this from the other cases. They admitted, that it had been ruled in *Tindal v. Brown*, that if time were given to the acceptor, it discharged the indorser; though the principal point there was as to the reasonableness of the time: and that this was followed up by *English v. Darley*; but it did not appear in the latter case but that the indorser might have been damnified by the giving time to the acceptor. In the subsequent case, however, of *Clarke v. Deolin* (c), the Court of C. P. held, that if the holder gave notice to the drawer of his intention to take a security from the acceptor, and the drawer made no objection; that should not discharge him; because, as some of the Judges there said, the drawer

(a) 1 *Bos. & Pull.* 652. 5.

(b) 2 *Bos. & Pull.* 61.

(c) 3 *Bos. & Pull.* 363.

was not injured : and that the ground of discharge in these cases was, that the holder by giving time to the acceptor did an act by which the drawer was injured. But the drawer cannot be injured where he had no effects in the hands of the acceptor at the time ; and therefore the principle of those cases does not apply to the present.

Lord ELLENBOROUGH C. J. How can a man be said not to be injured if his means of suing be abridged by the act of another ? If the plaintiffs, holders of the bill, had called immediately upon the defendants for payment as soon as the bill was dishonoured, they might immediately have sued the acceptor and the other parties on the bill. I had some doubts at the trial, but am inclined to think now that time was given. The holder has the dominion of the bill at the time : he may make what arrangements he pleases with the acceptor ; but he does that at his peril : and if he thereby alter the situation of any other person on the bill to the prejudice of that person, he cannot afterwards proceed against him. As to the taking part payment, no person can object to it, because it is in aid of all the others who are liable upon the bill : but here the holder did something more : he took a new bill from the acceptor, and was to keep the original bill till the other was paid. This is an agreement that in the mean time the original bill should not be enforced : such is at least the effect of the agreement ; and therefore I think time was given. His Lordship then observed that in strictness the defendants were entitled to enter a nonsuit, the objection having been taken at the trial : but that if the plaintiff's counsel thought he could alter the present state of the facts upon a new trial, he might take it in that shape on payment of costs. This, however, was afterwards waved, as I was informed, and judgment of nonsuit was entered.

1807.

GOULD
against
ROBSON.

[580]

1807.

Wednesday,
June 17th.

WELSFORD against TODD.

By stat. .
44G. 3. c. 98,
schedule B,
the duty,
which before
was laid on
horses let to
hire to travel
post by the
mile or
stage, is now
laid on horses
let to hire to
travel by the
mile or stage;
and persons
licenced by
schedule A of
that act to let
horses to hire
to travel post
by the mile
or stage, must
account for
the duty ac-
cording to
schedule B.
on such let-
tings to hire
as are therein
mentioned.
But quære as
to lettings to
hire for the
day to go to
certain
places and
back again.

* [581]

THIS was an action of assumpsit brought by the plaintiff, as farmer of the post-horse duties, to recover from the defendant the sums of 3s. 3d. and 1s. 9d. as the duties due from him to the plaintiff on the several lettings of a horse in manner after-mentioned. At the trial before* Lord *Ellenborough* at the sittings at *Westminster* a verdict was taken for the plaintiff for 3s. 3d. on the first count, and 1s. 9d. on the second count, subject to the opinion of this Court on a case reserved; which, after the first argument, was by desire of the Court turned into a special verdict, in substance as follows:

The plaintiff at the respective times of letting to hire, and using of the horses after mentioned, and of the charging to and receiving from *J. Langley* and *G. Coryndon* after-mentioned the respective sums of money after-mentioned, was, according to the form of the statute, the farmer and collector of the duties imposed by the statute or statutes in such case made, in respect of every horse hired by the mile or stage to be used in travelling in *Great Britain*, for every mile such horse was hired to travel: and in respect of every horse hired for a less period of time than 28 successive days for drawing on any public road any carriage used in travelling post, or otherwise; which accrued or became payable at the times when and the places where the said horses hereinafter mentioned were respectively so let, hired, and used; and is entitled to the respective sums of 3s. 3d. and 1s. 9d. as such duties, if the defendant be liable to pay the same. The defendant, being a person usually letting horses to hire, was at each of those times a person who had, according to the form of the statutes in such case made, taken out a licence, which was then in force, and was then duly licenced to let to hire any horses for the purpose of travelling post, by the mile, or from stage to stage, and also to let to hire for a day, or any less period of time than 28 successive days, any horses for drawing any carriage used in travelling post or otherwise. As to the letting mentioned in the first count, the jury found, that on the 29th of *May* 1806 at *Bath* in the county of *Somerset*. *J. Langley* hired of the defendant, who let to hire to him, a horse

[582]

to

1807.

WELSFORD
against
TODD.

to be used in travelling, and to travel 26 miles in the following manner; viz. J. Langley then and there informed the defendant that he wanted to hire a horse of him for the then next day; upon which the defendant then and there asked Langley whether the said horse was to go upon that occasion from Bath: to which Langley answered, that he wanted to ride the same to Hinton Blewett, 13 miles from thence, and back again from Hinton Blewett to Bath the same day: whereupon the defendant said to Langley, very well; you shall have a good horse, and I shall charge you 5s. for the same: which Langley then and there agreed to. And the horse was accordingly let and hired by the said parties respectively; and was on the then next day used by Langley under that hiring in travelling, by his riding it from Bath to Hinton Blewett and back again (the distance between the two places being 13 miles) on a public road, and was kept by him for that purpose the greatest part of the day. And the defendant afterwards on the same day charged to and received from Langley the said 5s. for the same. As to the second hiring, laid in the second count, the jury found that on the 31st of May 1806, at Bath, G. Coryndon hired of the defendant, who let to hire to him, another horse to be used in travelling, and to travel 14 miles in the following manner; viz. to ride from Bath to Bradford, a space of 7 miles, and back again from Bradford to Bath; for which the defendant was to be paid 4s. by Coryndon. And the horse was on the same day used by Coryndon under the last mentioned hiring in travelling, by his riding on the same from Bath to Bradford, and back again to Bath, on a public road; the distance between Bath and Bradford being 7 miles. And the defendant afterwards on the same day charged to and received from Coryndon the said 4s. for the same. The jury then found that the defendant, at the proper time and place, delivered in to the plaintiff, as the farmer and collector of and entitled to the duties, his stamp-office weekly account of the duties imposed by the statutes on horses let to hire by and hired of him by the mile or stage to be used in travelling in G. B., which accrued in the week in which the same horses were so let to hire and used as aforesaid; and did not account for or pay, nor hath accounted for or paid, to the plaintiff Welsford any duty whatsoever in respect of the same horses so let to hire, &c. That the said horses, before either of them had been

[583]

1807.
 —
 WELSFORD
 against
 TODD.

so let, hired, or used as aforesaid, but in the same year, had been returned by the defendant to the assessor under the stat. 43 Geo. 3. c. 161. and 45 Geo. 3. c. 13. as horses kept for the purpose of letting to hire, in order that the defendant might be assessed for the same under those statutes; and the defendant had been rated and assessed for the same under those statutes, viz. under schedule E. annexed to the last of those statutes; and had paid to the assessor for the king's use for the year in which the same were so let, hired, and used as aforesaid, 2*l.* 8*s.* for each of those horses. That the said horses have not, either of them, ever been let by the defendant, save as aforesaid, before the commencement of this action, which was commenced on the 17th of *June* 1806.

[584]

After the decision of the case of *The King v. Tooley*(a) upon the stat. 25 Geo. 3. c. 51. s. 4. that the letting of a horse to hire (which in that case was by a butcher in a town to a neighbour of his, an officer of the spiritual court) for the purpose of going upon business from one town to another and back again on the same day, was not such a letting to hire for the purpose of *travelling post*, within the popular sense of those words, as subjected the owner of the horse to the penalty imposed by that act for want of taking out a licence for that purpose; the case of *The King v. Swift* (b) was decided in the Exchequer, which was considered as throwing

(a) 3 *Term Rep.* 69.

(b) The following note was furnished to the counsel in the cause, as having been taken by a short-hand writer.

THE KING against SWIFT.

Exchequer Mich. 30 Geo. 3.

This was a scire facias in the exchequer upon the bond entered into by the defendant, under the stat 25 Geo. 3. c. 51., on receiving his licence; to which he pleaded performance: and the *Attorney-General* in the replication assigned several breaches upon letting of horses to go from *Liverpool* to *Preston*, and other short distances, within the limits of the act for regulating the *Liverpool* hackney coaches. After full argument,

EYRE Ch. B. gave judgment. The question in this case will depend principally upon the construction of the 42d section of the stat. 25 Geo. 3. c. 51., imposing duties, first, on horses hired by the mile or stage; secondly, on horses hired for a day or any less period of time, for drawing

throwing great doubt upon the former decision, though it did not in terms profess to overrule it. The stat. 25 Geo. 3. c. 51. on which those *decisions turned, required, s. 4. that " every post-master,

1807.

WELSFORD
against
TODD.

— .*[586]

ing on any public road any coach or other carriage used in travelling post. It is to be observed that the language of this section is as general as it can be ; every horse hired by the mile or stage shall be deemed to be travelling post. If it is to be restrained to a particular sense, not *every* horse hired by the mile or stage, but *certain* horses hired by the mile or stage, for particular purposes, are to pay the duty. The context must not only support but demand such a restriction : especially as the words describing the purposes of the hiring are here omitted for the first time, and therefore it should seem studiously omitted. If we look back to the context, it will be very clearly seen, that the great object of taxation was *travelling post* in its popular sense ; which popular sense agrees with the legislative definition of the term *travelling post* in the act of the 8 Ann., travelling several stages on a post road, and changing horses ; except that the popular sense does not require that the road should be a post road. It must be admitted that the regulations of the act have this object in view throughout all the clauses, particularly the 32d and 33d sections. But though the aggregate of the several stages to be travelled is to make the fund of the duty productive, the duty itself is charged upon every *separate* hiring by the stage : and this manner of charging the duty is at once breaking the chain and reducing it to the several links of which it was composed. And suppose the 42d section had not been to be found in the statute, I conceive that even the popular sense of travelling post must have been relaxed, and that it could not have been necessary, to make the duty attach upon the hiring to go one stage, that the person hiring should go on another stage, or change horses : and that hiring by the stage, for *one* stage, would have been deemed a hiring to be used in travelling post. If I had sent for hackney horses to draw my chaise to *Hounslow*, the duty would have attached upon that stage whether I had staid there or proceeded : I may add, whether the chaise were fitted as a litter, and I were to take six hours in going, or whether the horses flew with me. If that be so, I find nothing left in the idea of hiring horses by the stage to be used in travelling post, as applied to this subject of taxation, but the hiring hackney horses to go from one place to another. It may be asked, if such would have been the construction of the act, without the aid of the 42d section, why was that section introduced ? I presume for this purpose ; to exclude all doubt whether the legislature meant to use the words

1807.

V. ELSFORD
against
TODD.

“ master, innkeeper, or other person in *G. B.* who let to hire
“ any horse *for the purpose of travelling post by the mile, or from*
“ **stage to stage** &c. should pay so much for an annual licence :
and

*[587]

words *travelling post* in the strict sense in which travelling post is defined by the stat. 8 *Ann.*, that is travelling several stages, and changing horses, upon a post road. I am inclined to think this was the object of the 42d. section; for it does not dispense with the necessity of travelling several stages or changing horses generally; it is travelling several stages *on a post road*, or changing horses, which I construe changing horses *on a post road*; understanding this to be a plain reference to the statute of *Ann.* which is in these words; “ travelling several stages on a post road, and changing horses;” not saying changing horses *on a post road*;^{*} but that undoubtedly is its sense. What fortifies my observation is, that the subsequent members of the section dispense with nothing but what immediately belongs to the Post-office; “ although there shall not be any post-house, and although there shall not be any post settled or established on the road or on any part of the road.” So that if the words *travelling post*, in the clause imposing the duty, were to be understood in the extended popular sense, notwithstanding this 42d section, it would be still necessary to make the duty attach, that the traveller should go several stages, and change horses, on roads (not *post roads*; which certainly cannot be supposed to be the meaning of this law. The 42d section might be introduced for another purpose: I will suppose for a moment that all I have said upon the construction of this statute is erroneous: if there must be a travelling post, or quasi travelling post, according to the true intent of the former clauses; and if the 42d section dispenses with travelling several stages on all roads equally; still there is a purpose for which this section might well have been introduced; which still requires that the language of it should be understood in its universal sense, and does not require that we should do violence to that language by wresting it to a particular purpose. The second object of taxation in this statute is horses hired *by the day, or part of the day*, to draw carriages upon a public road, to be used in travelling post or otherwise. Without attempting to point out the difference between travelling post with horses hired, *by the day*, and horses hired *by the mile or stage*, I confess to my understanding it is obvious; that if there be a difference, this duty must be evaded. The duty may be evaded only by varying the contract, and making it a travelling by the mile or stage^{*}; to prevent which this section might be provided; and therefore

* *Qu.* by the day.

and that “in respect of every horse hired by the mile or stage to be used in travelling post, there should be * charged (a certain duty) for every mile such horse should be hired to travel post.” And
s. 42.

1807.

WELSFORD
against
TODD.

*[588]

the act has said that every hiring by the mile or stage shall be deemed a hiring to travel post. For either of these purposes we are not called upon to wrest the words of this clause from their primary and obvious sense to a more limited one. For what purpose should we? It is said, to make the clause consistent with the other clauses, which make *travelling post* an ingredient in the hiring; and to avoid the absurdity of first providing for special hirings, and then resolving them all into one general one. It will be recollected that I do not agree to the construction of the clause which raises this argument; but let us see how far it can be carried. Shew me how it can be made out that the clause is consistent with the former clauses, if there might still be a travelling post, or quasi travelling post, when these essentials of travelling several stages, and changing horses, are dispensed with. What is there left by which travelling is to be determined to be travelling post? The counsel did not resolve that difficulty when I stated it. I have never been able to resolve it upon the further consideration I have given it. I can do very well without post roads, without post horses, and posts established in the road; but if we take away the idea of *several stages*, and *changing horses*, what is there left but moving with hired horses from one place to another? And if it be considered what difficulties this uncertain notion of travelling post would impose, why are any difficulties to be thrown in the way? for it best agrees with the whole scope of the act that every hiring by the mile or stage shall be a hiring to travel post. Why should not a man pay a proportionable tax for the privilege of transporting himself from *one* place to another place, when he must pay it if he moves on to a *second* place? The statute directs that he shall pay; and therefore this excludes the argument: and the construction we put upon the 42d section protects the duties in the mode in which they are to be raised, and prevents fraud. The authority of *The King v. Tooley* was much pressed upon us: and we have not made up our minds upon this case, without attending to that case, and giving it due consideration: and to say that the greatest respect is due to the solemn opinion of one of the superior courts, and especially under the circumstances stated, by which it appears that that opinion was affirmed upon deliberation and inquiry, is in truth but to repeat what fell from me in the course of the argument. I do not mean to enter into an examination of the particular reasons assigned for that judgment. It is enough that I have stated the reasons for the judgment which we shall

VOL. VIII.

H h

pronounce.

1807.

WELSFORD
against
TODD.

s. 42. declared, "that every horse *hired by the mile or stage*, should
" be* deemed to be hired to *travel post*; though the person hiring
" the same did not go or travel several stages upon a post road,
" or

* [589]

pronounce. But I will say thus much respecting that case; that it is a case upon its circumstances very distinguishable from the present. First, it is distinguishable upon the fact: that was a hiring from *Totness* to *Ashburton* and *back again*, and, *to be at home the same day*; which goes very near to the idea of its being a hiring *for a day*, and *not* a hiring *by the mile or stage*. But upon the law, which is a better ground, the apparitor's case, as was truly observed in the course of the argument, was not intended to be within *the spirit* of this law; for if he had hired the horse *by the day*, he would not have been within any of those clauses, nor within the province of the statute. It never was intended to subject a man who hired a single horse *by the day* to any tax under this law. If that sort of contract were not intended to be taxed, it would be as unreasonable to tax him, by turning his hiring into a hiring *by the mile or stage*, as it would be to suffer him to escape taxation by turning it into a hiring *by the day*. The spirit of the law was preserved by that decision, as much as by our decision it would be outraged and violated, by adjudging that this was not a hiring *by the stage*; and therefore we hold that *The King v. Tooley* ought not to govern this case. But the carriage in this case was one of the *Liverpool* hackney coaches, and was used within the limits, within which they are made subject to the regulations of the corporation of *Liverpool*, who have rated certain fares for certain distances; and this coach was employed within those distances. This is certainly a popular objection, and sounds very plausible; and I think much better applies than the same kind of objection would apply in *The King v. Tooley*: for hackney coaches certainly do not often travel post; whereas butchers' horses, I believe, never travel any other pace. But the consideration of the velocity with which people travel was very properly abandoned, as not being distinction enough to enter into the constituents of *travelling post*. I thought it was extremely difficult to shake the argument upon this idea of a hackney coach. Hackney coaches it is said are established and regulated at *Liverpool*. They are regulated; but it can be hardly said that they are established; for any man may keep one who will, but he must submit to certain regulations. But what has that to do with the taxation put on his labour to be paid by the person using his coach? The regulations are the conditions by which he is allowed to let to hire within a particular distance. The regulations

“ or change horses ; and although at the *stage or place at or to
 “ which such horses should be hired, there should not be any
 “ post-house ; and although there should not be any post settled
 or

1807.

—
 WELSFORD
against
 TODD.

*[590]

regulations imposed by this statute for the purpose of securing this duty may happen to distress this sort of business which is carried on by a hackney coach : it may even make it very difficult for a hackney coachman to go on with his business. That may be a very good reason for getting an exemption in his favour, and it operated in the case of the *London* hackney coaches. It is not for us to inquire why it did not operate in favour of the *Liverpool* hackney coaches : it is enough that the same exemption is not introduced. The only intelligible way in which the argument could be put, upon this circumstance of the coach being a hackney coach employed at *Liverpool*, as it struck my mind, was that a hackney coachman plying for and carrying his fare within the limits could not with impropriety be said to let to hire to travel by the mile or stage. For the purpose of assisting this argument a stage was defined to be a place in the progress to some other place : but *stage* and *place*, both in the statute of *Ann.* and the 22 *Geo.* 2., which was made to introduce some new regulations with respect to the Post-office Act, and this statute of 25 *Geo.* 3., are clearly synonymous. In more than one place in these statutes *stage or place* is used synonymously. It was said there could be no *contract* here, because *the price* was fixed by superior authority. Let me suppose that the rates of post-chaises were fixed all over the kingdom, as it was once in contemplation to do, (I remember the subject under discussion in parliament,) would that prevent this tax from operating, for want of a letting to hire? In truth, this question has received a parliamentary decision : for in the Post-office Act the postmaster has the exclusive privilege of letting to hire post-horses ; and yet in the very same act the particular rate he is to take for that hire is fixed : so that there cannot be a more direct authority, that a rate being established in the construction of these words, “ *letting to hire*,” does not prevent their being a *letting to hire*. This defendant has then *let his horses to hire*, and *by the stage* ; for it was to go to a particular place *beyond the local limits of the town of Liverpool*. And I lay stress upon these words : because the Court do not choose, in a case where the facts do not oblige them, to encounter the difficulty of determining whether a letting to hire to pass from one part of the town of *Liverpool* to another part will bring the party within the law. I observe that the statute, where it speaks of a hiring *by the day*, speaks of horses drawing carriages on a public road ; and

1807.
 WELLS FORD
 against
 TODD.

“ or established on the road, or any part thereof; upon which
 “ such horses should be hired to go,” &c. Then after the de-
 cisions in the two cases above mentioned, followed the stat.
 44 *Geo. 3. c. 98.* which repeals the former duties, and gives
 (s. 2.) new duties according to schedules A and B. And
 schedule A directs the licence to be taken out “ by every post-
 “ master or other person who shall let to hire any horse, &c. for
 “ the purpose of *travelling post* by the mile, or from stage to
 “ stage,” &c., using the same term as in the former act. But
 Schedule B imposes the duty “ on every horse, &c. hired by the
 “ mile or stage to be used in *travelling* (omitting the word *post*,)
 “ for every mile such horse, &c. shall be hired *to travel*,” &c.

it is possible that circumstance may be a material ingredient, whenever
 it shall be necessary to raise the argument, whether travelling from one
 part of a town to another part shall be deemed within this law, and
 considered as travelling on a public road. If there had been a pro-
 vision in favour of the *Liverpool* hackney coaches similar to that of
London; which by the way affords a strong argument against the de-
 fendant upon the general construction of the statute; and also a strong
 argument against him, because he is not within the exemption, and
 others are: if he could have been brought within that clause, or have
 been otherwise exempted, it might have been then necessary to have
 inquired whether in the particular instances stated in this case, the de-
 fendant was acting as a hackney coachman, when, in two of them, he
 received more than the regular fare; and, in one, he was hired, not
 upon the stand, but at his own house. And I think it would be ex-
 tremely difficult to have found that he was then acting as a hackney
 coachman. We give no precise opinion upon that; because it was the
 wish of the parties that we should determine the question, as far as
 we could with propriety, upon the hackney coach, used strictly as
 such; and therefore we shall give an opinion upon that ground. And
 we are of opinion for the Crown upon this case, upon this ground,
 that the horses of a hackney coach drawing that coach upon a public
 road, from *Liverpool* to *Preston*, and the other places, for regulated
 fares, are within this act of parliament *let to hire, by the stage*, and as
 such, to be deemed to be used for travelling post within the meaning
 of this law, for the purpose of being made liable to the duty; which
 duty not having been regularly charged by the defendant, and the
 proper ticket delivered this bond is forfeited; and therefore judg-
 ment will be for the Crown.

The

The Attorney-General and *Dampier* therefore, who argued (a) for the plaintiff, relied principally on the omission of the word *post* in schedule B, as denoting the purposed *intention of the Legislature to lay the duty on every horse hired *by the mile or stage*, without adverting to the popular sense of the phrase *travelling post*, which had created the difficulty in the *King v. Tooley*: and ascribed the introduction of the word *post* in schedule A imposing the duty on the licence to mistake; a mistake however which could not affect the present case, where the duty on the hiring was in question. On the other hand, *Puller* for the defendant relied on the insertion of the word *post* in schedule A, on which a construction had been put in *Rex v. Tooley* as bringing this case within that decision, and that no travelling was meant to be taxed in the manner contended for, unless it were a *travelling post* within schedule A, as the obligation to account must correspond with the licence.

1807.

WELSFORD
against
TODD.

*[591]

The argument naturally branched itself into two parts, on the two different hirings; the one by *Langley*, which was contended by the defendant's counsel to be a hiring in effect *for the day*, though the particular stage were also specified; which was merely to ascertain the hire. And the Court having great doubts upon that view of the case, no judgment was finally given upon it: the inclination of the Court being that it was rather a question of evidence for the jury to have decided, whether, taking the whole of what passed between the parties at the time they contracted by the day or by the stage; the place to which the horse was said to be going were of the substance of the contract, or only a representation of the extent of the use intended to be made of it, in order to ascertain the charge. And therefore the Court suggested that it would be better to exclude the statement of *Langley's* hiring from the special verdict. And after a few days consideration upon *Coryndon's* hiring,

Lord ELLENBOROUGH C. J. stated the opinion of the Court shortly; that whatever doubt there might have been on the question as it occurred in the case of *The King v. Tooley*, rendered still more doubtful, as it was, by the determination in *The King v. Swift*, which could not be reconciled with the former opinion;

[592]

(a) The case was twice argued, once in *Hilary* term last, and again in this term.

1807.

WELSFORD
against
TODD.

at any rate all doubt was now excluded by the positive terms of schedule B in the stat. 44 G. 3. c. 98, leaving out, purposely as they must consider, the word *post*, as connected with travelling; and that in two places. Upon which description of travelling, viz. travelling *post*, the opinion in *The King v. Tooley* had been formed. And that this was not contravened by the insertion of the same term of travelling *post* in schedule A, imposing the duty on the licence to let horses for travelling *post*. But the Court must understand from schedule B that the Legislature meant to lay the tax on horses let out to travel by the mile or stage: and therefore upon the last count, which was upon the hiring by *Coryndon*, there must be

Judgment for the Plaintiff.

Wednesday,
June 17th.
[593]

SPARKES and Another against MARTINDALE.

Bail who are indemnified, being sued, upon the bail-bond, file a bill in equity for an injunction, suggesting want of consideration for the original debt, and an injunction is granted *pro tempore* on condition of paying the debt into court which is done accordingly; and after-

THE plaintiffs had become bail for the defendant in an action brought against him by one *Duddell*, which action was compromised upon the giving of certain money securities by the defendant, payable at different periods, for which it was agreed that *Duddell* should hold the bail-bond as a security: and the defendant thereupon gave a bond of indemnity to the plaintiffs, and a warrant of attorney to confess judgment: by which he agreed to indemnify and save harmless the plaintiffs against all sums of money, costs, and expences, &c. which they should pay and incur by reason of their becoming bail. And previous to the 1st of *February* 1806, the period to which the last insolvent debtors' act (46 Geo. 3. c. 108.) refers for the discharge of such debtors, some of the securities not having been paid when due to *Duddell*, he had sued the plaintiffs upon their bail bond; and they immediately after that action commenced, filed a bill

towards the money is paid over: held that the bail were damaged by such payment of money into court after notice to the debtor, and no fund provided by him; and not merely from the time when the money was taken out of court upon desolving the injunction. For one who agrees to indemnify, and save others harmless against a certain engagement, is bound to secure them from incurring any expence, as it runs on at the time, which falls upon them by virtue of that engagement.

in

1807.

SPARKES
and Another
against
MARTIN-
DALE.

in the Exchequer against *Duddell* for an injunction; suggesting that his demand against the defendant was for a gaming debt, and without consideration: and that Court granted an injunction upon condition that they should pay the amount of the securities then due into court, to abide the issue of that inquiry; which money was accordingly paid into court on the 14th of *June* 1805. On the 1st of *February* 1806 the defendant was in custody at the suit of another creditor for less than 1500*l.*; and after that period, the money paid into court by the plaintiffs, under the bill filed by them against *Duddell*, was taken out of court by the latter; and thereupon the bill was dismissed. After which, in *August* 1806, the plaintiffs entered up judgment on the bond and warrant of attorney against the defendant; and were afterwards served by him with notice to shew cause why he should not be discharged out of custody under the insolvent debtors' act. And having been discharged, as now alleged, by mistake, (for if the plaintiffs' debt existed before the 1st of *February* 1806, he was not entitled to be discharged,) the present rule was obtained by the plaintiffs, calling upon the defendant to shew cause why he should not be retaken and remanded in execution. And the question was, whether the indemnity bond given to the plaintiffs, the original bail, were forfeited before the 1st of *February* 1806; which depended on another consideration, whether the plaintiffs were damnified by the commencement of the action against them on the bail bond by *Duddell*, or by the filing of their bill in equity against him for an injunction, or by the payment of money into court in that suit, which money was ultimately, but after the 1st of *February* 1806, taken out of court by *Duddell*.

Marryat shewed cause, and contended in the affirmative, as well from the necessary expence incurred by the plaintiffs sued in their character of bail, as from the filing of their bill, and actual payment of money into court, which they were compelled to do in self-defence, for want of the defendant's paying the money due, or taking the expence of defending his bail upon himself.

The Attorney-General and *Barwis*, in support of the rule, said, that the filing of the bill in equity and the payment of the money

[594]

[595]

1807.

SPARKES
and Another
against
MARTIN-
DALE.

into court were both voluntary acts of the plaintiffs; and if any damnification to them, they were only such expences as they chose to submit to, and might have avoided, and which did not necessarily arise out of their character of bail: and the taking of the money out of court, which only was equivalent to the payment of the original debt, did not happen till after the 1st of *February*, till when it was uncertain whether the plaintiffs were bound to pay any thing. Then as to their being sued, that cannot constitute a damnification: for it had not appeared before the 1st of *February* 1806 but that they might have been sued wrongfully; and if so, they would have been entitled to judgment and their costs; which would have been no damnification. 1 *Roll. Abr.* 432. l. 42. But supposing the bond were forfeited before the 1st of *February*; what debt could the bail have then proved, so as to entitle themselves to share the insolvent's effects? the money was not paid over to the original plaintiff till afterwards. If a bond be given to indemnify one against a breach of covenant, and the bond be forfeited before the obligor's bankruptcy, yet it cannot be proved under his commission, because sounding in damages (a).

[596]

Lord ELLENBOROUGH C. J. said, that it did not distinctly appear upon the affidavits that the plaintiffs had given notice to the defendant of the action brought against them upon the bail bond; and that he had refused to bear the expence of it as it accrued: for they were entitled, not merely to be indemnified from expence actually incurred, but to be saved harmless from the incurring of any by reason of their engagement, which was to prevent their being damnified. The bond would not be forfeited merely by *Duddell's* bringing the action against them: but if *Martindale*, after notice, did not immediately take upon him the defence of the suit, but let them pay the expence as it went on, he did suffer them to be damnified: and whatever the event of the suit might be, they would have to pay the difference between the actual and the taxed costs. His Lordship then asked if the plaintiffs could make an affidavit that they had given the defendant notice of the required payment of money into court,

(a) *Coddard v. Vanderheyden*, 3 *Wils.* 262. 2 *Blac.* 784.

and that he had neglected to provide the fund for that purpose, which was the damnification they had alleged: for that would shew the bond to have been forfeited before the 1st of *February*: and it being admitted by the defendant's counsel that he had received such notice, and that the plaintiffs had paid their own money into court,

1807.

SPARKES
and Another
against
MARTIN-
DALE.

The Rule was discharged.

END OF TRINITY TERM.

AN

INDEX

OF THE

PRINCIPAL MATTERS.

ACTION ON THE CASE.

See PLEADINGS, No. 1. WARRANT, 1.

WAY, 1, 2.

1. **T**HE declaration in an action on the statute 9 G. 1. c. 22. s. 8., to recover damages against the hundred for the value of a stack of corn maliciously burnt, alleged that notice of the fact was given within two days to the inhabitants of the *parish* (instead of the "*town, village or hamlet*," which are the words of the act.) near the place, &c.; yet as the law *prima facie* intends every *parish* to be a *vill*, unless the contrary be shewn, this allegation is sufficient after verdict to sustain judgment for the plaintiff. But if it had been shewn at the trial that the parish consisted of several vills, and that the notice had been given to one more distant than another, the defendants would have been entitled to a verdict. *Cook v. The Hundredors of Pimhill*, H. 47 G. 3. 173
2. A parol license to put a sky-light over the defendant's area, (which impeded the light and air from coming to the plaintiff's dwelling house through a window,) cannot be recalled at pleasure after it has been executed at the defendant's expence; at least not without tendering the expences he had been put to: and therefore no action lies, as for a private nuisance, in stopping the light and air, &c. and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light. *Winter v. Brockwell*, E. 47 G. 3. 308
3. An action on the case lies against a surgeon for gross ignorance and want of skill in his profession, as well as for negligence and carelessness, to the detriment of a patient: though if the evidence be of negligence only; which was properly left to the jury, and negatived by them; the Court will not grant a new trial, because the jury were directed that want of skill alone would not sustain the action. *Seare v. Prentice*, E. 47 G. 3. 348

ADMINISTRATION, *Letters of*.

1. The original book of acts, directing letters of administration to be granted, with the surrogates fiat for the same, is evidence of the title of the party to whom the administration is directed to be granted of the intestate's effects, without producing the letters of administration themselves; notwithstanding subsequent letters of administration granted to another; the first not being recalled.

- recalled. *Elden v. Keddel, H. 47 G. 3.* 187
2. A payment of a debt to an administratrix de facto is sufficient; though the letters of administration were afterwards recalled. *ib.*
 3. A sole next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing 40 days in the same parish after the intestate's death, before administration granted to her. And it matters not that the widow of the intestate survived him, if she died afterwards without having taken out administration, leaving the other sole next of kin to the intestate. But no settlement is gained by the mere relation back to the death of the intestate of the letters of administration when granted, taken out only 18 days before the next of kin parted with her interest in the leasehold; so as to connect a residence for those 18 days with a residence by such next of kin in the same parish for more than 40 days, after the death of the intestate and his widow, before such administration granted. *The King v. The Inhabitants of Horsley, E. 47 G. 3.* 405
 4. A mandamus lies to the ordinary to grant administration to a sole next of kin; or to grant it to one or other of the next of kin, where there are several. *Rex v. The Inhabitants of Horsley, E. 47. G.* 408

ADVOCATE.

No mandamus lies to the archbishop of Canterbury to issue his fiat to the proper officer, &c. for the admission of a doctor of civil law, graduated at Cambridge, as an advocate of the Court of Arches. *The King v. The Archbishop of Canterbury, H. 47 G. 3.* 213

AFFIDAVIT, to hold to Bail.

1. An affidavit to hold to bail, only stating that the defendant was "indebted to the plaintiff for goods sold and delivered, (not saying by the plaintiff to him, the defendant,) is insufficient. *Carlthrow v. Hagger, M. 47 G. 3.* 106
2. An affidavit of debt made by the plain-

tiff, residing in a foreign country, before a foreign magistrate, whose signature to the jurat and his authority in that country to administer oaths and take affidavits were verified by a proper affidavit in this country, is a sufficient foundation for a Judge's order to hold the defendant to special bail: and this, notwithstanding the stat. 12 G. 1. c. 29. which requires an affidavit of the cause of action *by the plaintiff*; by which must be understood such an affidavit taken before a competent jurisdiction in this country, whereon, if false, perjury might be assigned: for that part of the statute is restrictive of the acts of plaintiffs only, and not of the Courts. But any person making or knowingly using a false affidavit so made abroad for this purpose is guilty of a misdemeanor in attempting to pervert public justice, and is punishable by indictment. *Omeally v. Newell, E. 47 G. 3.* 364

AGREEMENT.

See ASSUMPSIT, LANDLORD, AND TENANT, No. 1. SEAMEN, 2. USURY. WARRANTY, 1.

ALIEN ENEMY.

Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, was licensed by the king's authority; held that an insurance on the *enemy's ship*, as well as on the goods and specie put on board for the benefit of the *British* subjects, was incidentally legalized; and that it was competent for the *British* agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue. *Kensington v. Inglis, H. 47 G. 3.* 273

APPEAL.

1. The *St. Alban's* paving and regulating act, 44 G. 3. empowers five commissioners, *assembled at a public meeting holden*

holden by virtue of the statute, to do certain acts; amongst others, to deliver *notice in writing* to any inhabitants to abate nuisances and encroachments in the street before their houses; and on failure, empowers the commissioners to abate them; and gives an *appeal* to the Quarter Sessions of the borough "against any matter or thing to be done by the commissioners in pursuance of the act;" held that an *appeal* lay against such *notice in writing*; such construction being within the words of the act, &c. and most beneficial for the commissioners themselves, as well as for the inhabitants whose property was to be affected by such acts. *The King v. Kingston and Others*, M. 47 G. 3. 41

2. Though the act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or *appeal*, for any cause relating to the act, or any thing done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer; it does not extend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them; however, they may afterwards recoup themselves out of the fund in the treasurer's hands. *ib.*
3. The party appealing to the Sessions is not thereby concluded from afterwards disputing its jurisdiction in the particular case. *Lowther v. The Earl of Radnor*, M. 47 G. 3. 113

APPRENTICE.

Where the master and father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving for five years, and find utensils, and that the son should receive half his earning, and the master the other half; under which the boy served out the time as an apprentice: held that this agreement between the father and master (to which the son was no party) not binding the son, or the father for him, to any service to the master; but the sons service in fact being

merely voluntary; was no apprenticeship in point of law; and consequently no settlement could be gained by the son serving his master under such a contract. *The King v. The Inhabitants of Cromford*, M. 47 G. 3. 25

ARREST.

See ESCAPE, No. 1. VOLUNTEERS, I.

The defendant cannot justify an assault and false imprisonment of *A. B.* by shewing a latitat issued against *C. B.*, and averring that it was issued against *A. B.*, and that they are one and the same person; there being no averment that *A. B.* was known as well by the name of *C. B.* *Shadgett v. Clipson*, E. 47 G. 3. 328

ASSUMPSIT.

See GUARANTEE, No. 2.

1. Where the legal title to a ship remained for a month after the sale in the vendors, upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorized to make registry, &c. pursuant to the stat. 34 G. 3. c. 68. s. 15.; yet the vendors are not liable during that interval for repairs ordered by the captain, under the direction of the vendee, (who for this purpose must be considered as a stranger to the legal owners,) and consequently had no authority express or implied to bind them. *Young v. Brander*, M. 47 G. 3. 10
2. If an officer permit a prisoner to go at large on his promise to pay the debt to the creditor; in consequence of which he is obliged to pay the creditor himself; he cannot recover back the money from the debtor; being guilty of a breach of duty, out of which he cannot derive a cause of action. *Pitcher v. Bailey*, H. 47 G. 3. 171
3. Assumpsit lies against a lessee from year to year upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees

assignees during part of the time for which the rent accrued; which were pleaded in bar. *Boot v. Wilson, E.* 47 G. 3. 311

4. Money paid by *A.* to *B.*, in order to compromise a *qui tam* action of usury brought by *B.* against *A.*, on the ground of an usurious transaction between the latter and one *E.*, may be recovered back in an action by *A.* for money had and received. For the prohibition and penalties of the stat. 18 *Eliz. c. 5.* attach only on the "informer or plaintiff, or other person suing out process in the penal action, making composition," &c. contrary to the statute; and not upon the party paying the composition; and therefore the latter does not stand, in this respect, in *pari delicto*, nor is *particeps criminis* with such compounding informer or plaintiff. *Williams v. Hedley, E.* 47 G. 3. 378
5. And such recovery may be had, although *E.*'s assignees had before recovered from *B.* the money so received by him, as money received to their use (the money paid by way of composition being at the time stated to be *E.*'s money); there being no evidence at the trial of this cause to shew that *A.* the present plaintiff was privy to that suit. *ib.*

ATTORNEY.

1. The Court will not compel an attorney, upon a summary application, to deliver up, on payment of his demand, a lease put into his hands for the purpose of making an assignment of it; there being no cause in court, nor any criminal conduct imputed to him in respect of it. *In the Matter of S. Lowe, H.* 47 G. 3. 237
2. The plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant against the debt and costs recovered by him on the final result of the cause; notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs, &c. of the cause. *Howell v. Harding, E.* 47 G. 3 362

AWARD.

1. Where an award is made after the time originally given to the arbitrators, but authority was also given to them to enlarge the time; an award within the enlarged time authorised is good upon the face of it, though it do not recite that the arbitrators did in fact enlarge the time: but the court will not grant an attachment for the non-performance of the award without the verification of that fact. *George v. Lousley, M.* 47 G. 3. 13
2. Where the costs of the cause, and of the special jury, are distinctly and separately submitted to the discretion of arbitrators, they must distinctly adjudicate upon each; otherwise the award is bad; (but the plaintiff in this instance agreed to abandon it for so much.) *ib.*
3. The award was also set aside for so much as the arbitrators, without authority, had directed to be paid for their own expenses. *ib.*
4. An inclosure act having directed that the allotments made by the commissioners should for ever remain for the benefit of the appointees: held that an award and assignment of the *herbage* of a certain close to the surveyors of the highways and *their successors*, for the benefit of the parish of *B.*, though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take: the same as if the terms of the award had been specifically enacted. And the lord of the manor, in whom the fee of the soil remained, is a trustee for the surveyors of the highways for the time being. *Johnson v. Hodgson, M.* 47 G. 3. 38
5. After the delivery of an award, the arbitrator cannot, though within the time limited by the submission, correct a mistake in the calculation of figures, by making another award corresponding to the admitted proportions of a partnership fund. *Irvine v. Elton, M.* 47 G. 3. 54
6. Partiality and improper conduct in an arbitrator,

arbitrator, in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond, conditioned for the performance of the award; but is only matter for application to the equitable jurisdiction of the Court to set aside the award: Neither can a parol agreement between the parties to wave and abandon the award be pleaded to such action. *Braddick v. Thompson*, *E. 47 G. 3.* 344

7. The submission being of *all matters* in difference between the parties, an award of so much to be paid by the defendant to the plaintiffs on their *banking account*, is binding between them; for no other matter in difference between them shall be intended, unless it be shewn: and the award is good for so much, though the arbitrators also awarded a sum to be paid by the plaintiffs to the defendant out of a partnership fund in which others than the defendant were interested who were no parties to the submission. *Ingram v. Milnes*, *T. 47 G. 3.* 445
8. The time limited by the stat. 9 and 10 W. 3. c. 15. s. 2. for setting aside awards, made under submissions by virtue of that statute, does not attach on awards made under orders of nisi prius. *Synge v. Jervoise*, *T. 47 G. 3.* 466

BAIL.

See AFFIDAVIT TO HOLD TO BAIL.

1. A defendant arrested, held to bail, and rendered, and afterwards superseded for want of being charged in execution, cannot be held to bail again upon bills of exchange given by him before he was rendered, as a collateral security for the damages and costs recovered against him in the former action, and upon agreement for a stay of execution till default made in payment of the bills. *Daniel v. Dodd*, *E. 47 G. 3.* 334
2. Where the defendant in the action gave a cognovit for the debt and costs payable by seven instalments; and after the bail were fixed an act passed for discharging insolvent debtors in custody

for debts due at a certain day, prior to the bail being fixed, at which day three only of the instalments were payable; and afterwards the principal was discharged under the act, when only two more of the instalments had become payable: yet held that the bail were liable for the whole condemnation-money; the entire debt, qua debt, being due instantly, with a stay of execution only for certain proportions at certain times. *Shakespeare v. Phillips*, *E. 47 G. 3.* 433

3. Bail who are indemnified, being sued upon the bail-bond, file a bill in equity for an injunction, suggesting want of consideration for the original debt; and an injunction is granted pro tempore on condition of paying the debt into court; which is done accordingly; and afterwards the money is paid over: held that the bail were damnified by such payment of money into court, after notice to the debtor, and no fund provided by him; and not merely from the time when the money was taken out of court upon dissolving the injunction. For one who agrees to indemnify, and *save* others *harmless* against a certain engagement, is bound to secure them from incurring any expence, as it runs on at the time, which falls upon them by virtue of that engagement. *Sparks Martindale*, *T. 47 G. 3.* 593

BANKRUPT.

1. Where one leased for 21 years, if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farm-house, and actually occupy the lands, &c. and not let, set, assign over, or otherwise depart with the lease: held that the tenant having become bankrupt, and his assignees having possessed themselves of the premises and sold the lease, and the bankrupt being out of the actual possession and occupation of the farm, the lessor might maintain an ejectment without a previous re-entry; the continuance of the term itself being made to depend upon the lessee's actual occupation. *Doe v. Clark*, *H. 47 G. 3.* 185

2. The

2. The vendee of goods having accepted a bill of exchange for the price of them, and becoming bankrupt before the bill became due, the guarantee who paid the vendor after the bankruptcy of the vendee may recover back the money from the latter, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; and the notorious insolvency of the vendee acceptor being at least a *prima facie* warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill; however, it might still be competent for the vendee to defend himself against this action by the guarantee, by shewing that if a demand for payment had been made upon him by the holder, the bill would have been paid. *Warrington v. Furbor*, *H. 47 G. 3.* 242
3. Assumpsit lies against a lessee from year to year upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued; which were pleaded in bar. *Boot v. Wilson*, *E. 47 G. 3.* 311
4. Debt does not lie against a bankrupt on the reddendum of a lease for rent accruing after the commissioners' assignment; the lessors assent of such assignment being virtually included in the act of parliament authorizing the assignment of the bankrupt's estate. *Wadham v. Marlowe*, *M. 25 G. 3.* 314. *n.*
5. Under the stat. 1 Jac. 1. c. 15. s. 10 & 11. it is not necessary, upon summoning a witness before commissioners of bankrupt to be examined touching the bankrupt's effects, to tender him the expences of his journey before-hand; though if he be in fact without the means of taking the journey, it may be an excuse for not obeying the summons: and consequently a warrant issued by the commissioners on account of the non-attendance of such witness, without lawful impediment, authorizing his arrest for the purpose of examination, is legal.
- 2dly, It lies on the party so summoned, having a lawful excuse for not attending, to prove the fact in an action of trespass and false imprisonment, brought by him for such arrest; admitting that an inability to bear the expence of the journey is a lawful impediment.
- 3dly, Such warrant for the arrest of the witness, in order to examine him, may issue after his disobedience to the *first* summons.
- 4thly, The propriety of granting the warrant, being an act of discretion, must be determined upon by the commissioners acting together at the time. And their order to their officer to make out such warrant must be taken to include their direction as to the persons to whom it is to be directed: but the mere act of signing the names of the commissioners to the warrant may be done by them separately. *Battye v. Gresley*, *E. 47 G. 3.* 319

BARRATRY.

See INSURANCE, No. 1.

BASTARDY.

1. An order of bastardy, stated to be made upon the oath of the wife, *as otherwise*, is good; for it will be presumed that the non-access of the husband was proved by competent witnesses on oath other than the wife; or if proved by her also, that the judgment was founded on the other proof. *The King v. Luffe*, *H. 47 G. 3.* 193
2. Such an order, filiating the child of a married woman, is good; though it only state that such child was *likely to become chargeable*; which are the words of the stat. 6 G. 2. c. 31. s. 1. as applied to the bastards of single women; for upon that statute, as well as the stat. 18 Eliz. c. 3. which has the words *born out of lawful matrimony*, the only question is, Whether the child be by law a *bastard*? *ib.*
3. Non access of the husband need not be proved during the whole period of the wife's pregnancy: it is sufficient if

if the circumstance of the case shew a natural impossibility that the husband could be the father; as where he had access only a fortnight before the birth. *ib.*

BILL OF EXCHANGE.

See TENDER, No. 1.

1. The vendee of goods having accepted a bill of exchange for the price of them, and becoming bankrupt before the bill became due, a guarantee who paid the vendor after the bankruptcy of the vendee may recover back the money from the latter, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; and the notorious insolvency of the vendee acceptor being at least a prima facie warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill; however, it might still be competent for the vendee to defend himself against this action by the guarantee, by shewing that if a demand for payment had been made upon him by the holder, the bill would have been paid. *Warrington v. Furber*, H. 47 G. 3. 242
2. If the holder of a bill when due, after taking part payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder should keep the original bill in his hands as a security; such agreement amounts to giving time and a new credit to the acceptor, and discharges the indorser, who was no party to the agreement; though the drawer might have had no effects in the hands of the acceptor. *Gould v. Robson*, T. 47 G. 3. 576

BILL OF SALE.

Though a bill of sale for transferring the property in a ship by way of mortgage may be void as such, for want of reciting the certificate of registry therein, as required by stat. 26 Geo. 3. c. 60.

CIVILIANS.

s. 17. yet the mortgagor may be sued upon his personal covenant contained in the same instrument for the repayment of the money lent. *Kerrison v. Cole*, H. 47 G. 3. 231

BOND.

See INFANT, No. 1.

CERTIFICATE.

See SETTLEMENT BY CERTIFICATE.

CHARITABLE USES.

Where the founder of a hospital directed that if, in making up the accounts of the wardens biennially going out of office, any doubt should arise, which could not be decided by the new wardens, &c. the ordinary should decide it: and also gave to him the appointment of a master, upon the default of other persons to appoint, within certain times; and power to correct or amove the master for certain causes, and also power to sequester the profits of the wardens, &c. in case of the improper subtraction of a certain sum directed to be kept in a chest for special purposes, until the money was replaced; and also gave to the ordinary the power of *interpreting the statutes* in case of any doubt: and the founder also delegated to the dean and chapter of York power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity: held that none of the powers so delegated constituted a *visitor*, so as to exclude the application of the powers granted by the stat. 43 Eliz. c. 4.; and consequently that a commission of charitable uses issued out of the Court of Chancery under that act was valid. *Kirkby Ravensworth Hospital Case*, H. 47. G. 3. 221

CHARTER-PARTY.

See FREIGHT, No. 1.

CIVILIANS.

See MANDAMUS, No. 2.

COMMIS-

COMMISSIONERS UNDER PRIVATE ACTS, (THEIR LIABILITY FOR COSTS.)

See COSTS, No. 1, INDICTMENT, 1, 2, 3.

JURISDICTION, 1, 2.

COMMONER.

If in an action on the case for an injury done to the plaintiff's right of common by digging turves there, the Judge certify under the stat. 43 *Eliz.* c. 6. s. 2. that the damage did not amount to 40s., the plaintiff shall have no more costs; for the *interest or title of the land* does not necessarily come in question in such action, and did not in fact in this case, where the action was brought against another commoner for a mere wrongful act. *Edmonson v. Edmonson*, H. 47 G. 3. 294

COMPOUNDING PENALTIES.

1. Money paid by *A.* to *B.* in order to compromise a *qui tam* action of usury brought by *B.* against *A.*, on the ground of an usurious transaction between the latter and one *E.*, may be recovered back in an action by *A.* for money had and received. For the prohibition and penalties of the stat. 18 *Eliz.* c. 5. attach only on the "informer or plaintiff or other person suing out process in the penal action, making composition," &c. contrary to the statute; and not upon the party paying the composition; and therefore the latter does not stand in this respect, in *pari delicto*, nor is *particeps criminis* with such compounding informer or plaintiff. *Williams v. Hedley*, E. 47 G. 3. 378
2. And such recovery may be had although *E.*'s assignees had before recovered from *B.* the money so received by him, as money received to their use, (the money paid by way of composition being at the time stated to be *E.*'s money;) there being no evidence at the trial of the cause to shew that *A.* the present plaintiff was privy to that suit. *ib*

CONDITION PRECEDENT.

See COVENANT, No. 3.

CONTRACT.

See WARRANTY, No. 1.

CONVICTION.

1. The stat. 42 G. 3. c. 119. against illegal lotteries, directing the penalty to be distributed, 1-3d to the king, 1-3d to the informer, and 1-3d to the person apprehending or securing the offenders; a conviction directing the penalty to be distributed as the law directs, without ascertaining to whom the last third is to be paid, (the person being uncertain,) is bad. *The King v. Seale*, T. 47 G. 3. 568
2. But it need not appear that there was in fact any illegal lottery, if it be shewn that the money was taken for that purpose. *ib.*
3. A conviction stated to be made by justices of the peace, &c. at the public office in Great Marlborough-street, &c. does not legally denote that it was made by one of the police magistrates under the stat. 42 Geo. 3. c. 76, &c. *ib*

COPYHOLD.

1. *A.*, a copyholder for life, remainder to *B.*, surrenders his own and *B.*'s estate, (over which latter he had no control, and by which he let in *B.*'s remainder,) and takes a new copy for the lives of himself, *C.*, and *B.*, successive; and on *A.*'s death, after 20 years had run against *B.*, *B.* enters on the possession then vacant; held that as against *C.*, who had no possession and no title, *B.* might defend his legal title, coupled with possession, in ejectment; however 20 years adverse possession by *A.* might have barred *B.*'s possessory right against him; or might have disabled *B.* if he had continued out of possession, from recovering in ejectment. *Doe v. Reade*, E. 47 G. 3. 353
2. Where three lives in a copy are to take successive, and a father the sole purchaser, puts in the lives of himself and

and his two sons, in general the sons shall take beneficially, unless it appear by any concurrent act of the father that he did not so intend it: as by taking at the same court a licence from the lord to himself and his mother (who had her free bench) to lease for 70 years. In which case, if the farmer afterwards lease by way of mortgage pursuant to such licence, and there be a custom in the manor for the first taker to dispose of the estate as against the other lives, such custom may operate to divest the legal estate of the lives in reversion, and give it to the lessee; or if that were doubtful; or if the licence of the lord might be construed to extend only to the first taker of the new copy *jointly* with his mother, and the first taker *alone* executed such licence after her death; yet a court of equity (even if the surviving life, (the son,) succeeded at law on his strict legal title) would make the son the surviving life, convey to his father's lessee and pay all the costs in law and equity. *Swift d. Farr, v. Davies, H. 39 G. 3. MS. 358. n.*

CORN GROWING.

See DEVISE, No. 4.

CORPORATION.

1. An ejectment against the bailiffs pro tempore of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But at any rate such tenancy may be determined by a notice to the corporation to quit, served on its officers: after which, the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them or maintain ejectment against any person in the actual possession of the premises. *Doe v. Woodman, H. 47 G. 3. 228*

2. A charter having granted that upon the death or amotion of a principle burgess (*who is appointed to hold for life*) it should be lawful for the mayor and the remaining principal burgesses, *within eight days next following*, to elect another; the eight days after a vacancy having slipped without an election, a mandamus was granted upon the stat. 11 G. 1. c. 4. s. 2. to make an election. *The King v. Mayor, &c. of Thetford, H. 47 G. 3. 270*
3. If a presiding officer, who by the constitution of the borough forms an integral part of an elective assembly, depart from it after the meeting has been regularly formed and the election entered upon, but before it is completed, an election made after his departure is void. *The King v. Buller E. 47 G. 3. 389*
4. Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by A. B. declared on were known by a certain other name, by which name A. B. granted to them a certain watercourse, and covenanted for quiet enjoyment: held that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken on that fact. *The Mayor, &c. of Carlisle v. Blamire, T. 47 G. 3. 487*
5. Where the *whole* corporation are summoned for a particular purpose, (e. g. to receive the resignation of a common councilman) a *select body*, who are *all present and consenting*, may at the same meeting, without any particular summons to them for that purpose in their select capacity, proceed to an election of a common councilman in the place of the other resigned; the power of election being in such select body, and the charter not requiring any previous summons. *The King v. Theodorick, T. 47 G. 3. 543*

COSTS.

1. Though a local regulating act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or *appeal*, for any cause relating to the act, or any thing done by or under the authority of the same shall be defrayed out of the money in the hands of the treasurer;" it does not extend to discharge the commissioners from personal responsibility in the first instance, for the costs of an appeal awarded to be paid by them, however they may afterwards recoup themselves out of the fund in the treasurer's hands. *The King v. Kingston and others*, M. 47 G. 3. 41
2. And they may be indicted for non-payment of such costs. *ib.*
3. Upon an indictment for perjury removed into B. R. by certiorari, if the prosecutor give notice of trial to the defendant, and withdraw his record without countermanding his notice in time, he shall pay costs to the defendant. *The King v. Bartrum*, H. 47 G. 3. 269
4. If in an action on the case for an injury done to the plaintiff's right of common by digging turves there, the Judge certify under the stat. 43 Eliz. c. 6. s. 2. that the damages did not amount to 40s., the plaintiff shall have no more costs; for the *interest or title of the land* does not necessarily come in question in such action, and did not in fact in this case, where the action was brought against another commoner for a mere wrongful act. *Edmondson v. Edmondson*, H. 47 G. 3. 294
5. Though the stat. 16 & 17 Car. 2. c. 8. s. 3. provides that no execution in ejectment shall be stayed unless the plaintiff in the writ of error shall be bound for the costs in case judgment be affirmed, &c.; yet by reasonable construction it is sufficient if he procure proper sureties to enter into the recognizance of bail: but these may be examined as to their sufficiency, which the plaintiff in error himself cannot be.

The practice is to take the recognizance in double the improved rent, and the single costs of the ejectment. *Keene v. Deardon*, E. 47. G. 3. 298

6. The plaintiff is entitled to set of interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause; notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs, &c. *Howell v. Harding*, E. 47 G. 3. 362
7. Where a party obtains leave by consent, to examine witnesses abroad on depositions, he is not entitled to be allowed the expence of taking the depositions in the taxations of costs, though he succeed. *Taylor v. The Royal Exchange Assurance Company*, E. 47 G. 3. 393

COURT OF REQUESTS, &c.

1. The court of requests act for *Southwark*, &c. enacts, that "if in any action, &c. for recovery of any debt, sued against any person (within the jurisdiction) in any of the king's courts at *Westminster*, &c. it shall appear to the Judge, &c. that the debt to be recovered by the plaintiff doth not amount to 40s. &c." the plaintiff shall pay the defendant costs, &c.: held that where the plaintiff's witness proved that the debt, which was originally above, was reduced below 40s. by *part payment* before the action brought, the case was within the statute. *Clark v. Askew*, M. 47 G. 3. 28
2. The same point was ruled on the *London* court of requests act, 39 & 40 G. 3. c. 104. *Horne v. Hughes*, T. 47 G. 3. 347
3. In *M'Collam v. Carr*, 1 Bos. & Pall. 223. 1d. C. J. *Eyre* considered that no case would be within the *Middlesex* court of conscience act 23 G. 2. c. 33. where the original debt being above 40s., was reduced below that sum by a balance of accounts. Sed quære; for the words of that act are peremptory, that *in case the jury shall find the da-*
mages

mages for the plaintiff under 40s., unless the Judge shall certify, &c. the defendant shall recover double costs. Clark v. Askew, M. 47 G. 3. 30

4. The *London* court of requests act 39 & 40 G. 3. c. 104. s. 12. provides that if any action be commenced out of that court for any debt not exceeding 5*l.* (within the jurisdiction) the plaintiff shall not, by reason of a *verdict* for him, or otherwise, be entitled to costs, &c.: held that after judgment by default, and the damages assessed upon a writ of enquiry, the defendant might come into court and move to stay proceedings on payment of the damages assessed, without costs. *Dunster v. Day, H. 47 G. 3.* 239
5. A market gardener who rented a stand with a shed over it in *Fleet* market at an annual rent, which he occupied three times a week on market days till 10 o'clock in the morning; after which, and on all other days, it was occupied by others; does not *keep* a stand within the meaning of the *London* court of requests act 39 & 40 G. 3. c. 104. so as to be privileged to be sued there for a debt under 5*l.* *Grey v. Cook, E. 47. G. 3.* 336
6. If a debt be reduced by part payment below 5*l.* before the action brought, the case is within the *London* court of requests act 39 & 40 G. 3. c. 104. *Horn v. Hughes, E. 47 G. 3.* 347

COVENANT.

1. By indenture, between *A.* and *B.* and *C.*, dissolving their partnership as ropemakers, *A.* and *B.* covenanted to allow *C.* during his life 2*s.* on every cwt. of cordage which they should make on the recommendation of *C.* for any of his friends and connexions, and whose debts should turn out to be good; and that *A.* and *B.* should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of *C.*'s connexions whom they should be disinclined to trust. And *C.* covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that all debts con-

tracted or to be contracted in his or their names, pursuant to the indenture, should be the exclusive property of *A.* and *B.*; and that *C.* should, during his life, exclusively employ *A.* and *B.*, and no other person, to make all the cordage ordered of him, by or for his friends and connexions, on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever: held

- 1st, That the covenant by *C.* to employ *A.* and *B.* exclusively to make cordage for his friends, and not to employ any other, &c.; *A.* and *B.* not being obliged to work for any other than such as they chose to trust, was not illegal and void, as being in restraint of trade without adequate consideration; for the whole indenture must be construed together, according to the apparent reasonable intent of the parties; and the general object being only to appropriate to *A.* and *B.* so much of *C.*'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and *C.* was still at liberty to work for any of his friends who were refused to be trusted by *A.* and *B.*: by which construction the restraint on *C.* was only co-extensive, as in reason it could only be intended to be, with the benefit to *A.* and *B.*; and therefore the restraint on *C.* could be no prejudice to public trade.

- 2dly, That breaches assigned generally against *C.* for having made cordage for divers persons other than for government, and for employing other persons than *A.* and *B.* to make cordage for his friends, &c. were well assigned, though no particular persons were named, nor the quantities or kinds of cordage mentioned, &c.; such facts lying more particularly within *C.*'s knowledge. *Gale v. Reed, M. 47 G. 3.* 80

2. Though a bill of sale for transferring the property in a ship by way of mortgage may be void, as such for want of reciting the certificate of registry therein, as required by stat. 26 G. 3. c. 60. s. 17.; yet the mortgager may be sued upon

upon his personal covenant contained in the same instrument for the re-payment of the money lent. *Kerrison v. Cole*, H. 47 G. 3. 231

By a charter-party of affreightment the owner of the ship covenanted to take on board at *London* the freighter's goods, and proceed therewith to *Monte Video*, and there to deliver them to the freighter's agent, and receive from him another cargo, and (wind and weather permitting) proceed therewith to his port of discharge in *G. B.*, and there deliver the same to the freighter, and end the said voyage. In consideration whereof the freighter covenanted to pay 670*l.* per month for freight, during the said intended voyage to *M. V.*, and back to her port of discharge; such freight to commence from the day the ship should be ready to receive her outward-bound cargo, and to end when she should have finally discharged the whole; and also to pay two-thirds of all pilotage and port-charges during the said voyage; such freight, pilotage, and port-charges to be paid on the arrival and discharge of the ship at her destined port in *G. B.*---

In covenant by the owner for an alleged breach in non-payment of freight, pilotage, and port charges, it is not enough to shew that the ship, after having taken in a cargo in *G. B.* and proceeded part way on the voyage, but before her arrival at *M. V.*, was, without the default of the owner or crew, wrongfully seized and brought back to *London*, and there detained for some time, till she was restored to the owner; in consequence of which she required repairs, which were done with all necessary dispatch; and that the owner was then ready and willing to cause the ship to prosecute and complete her voyage, and gave notice thereof to the freighter, and tendered him the ship properly fitted, &c. for that purpose, and requested him to give the necessary instructions in that behalf, and offered to observe the same, &c. but that the freighter would not give any such instructions, &c. nor permit the

ship to prosecute or complete the voyage; but refused to do so, and wholly renounced the charter-party, and the further prosecution of the voyage, and wholly discharged the owner from further prosecuting or completing the voyage, and dispensed therewith.

For the freight (*qua* freight,) pilotage, and port-charges, are only covenanted to be paid by the freighter on the arrival and discharge of the ship at her destined port in *G. B.*, and therefore such arrival and discharge, (which must be understood after the stipulated voyage performed,) are conditions precedent to the owner's right to freight, &c. And it is not enough to shew that the owner did all in his power towards earning the freight, &c. by the tender of his ship to complete the voyage, and his offer to obey the freighter's instructions; because though the owner had actually done, as far as lay in his power, all that he offered to do, and which the freighter discharged him from doing, it would only have amounted at most to an endeavour on his part to complete the voyage and earn the freight, &c. but such completion was still liable to be defeated by the act of God, or the accidents of the voyage; and the performance of the condition which was to entitle the owner to freight, &c. would still have been contingent, although such his offers had been accepted by the freighter. Therefore this is not like the cases where a party tendering to do that which he has undertaken; and which he has the immediate power of doing at the time, in order to entitle himself to a concurrent duty from another, is by a refusal of that other to accept of such tender, dispensed with the necessity of averring performance of it, in an action for a breach in not performing the subsequent or concurrent duty. *Smith v. Wilson*, T. 47 G. 3. 437

4. The devisee of the equity of redemption, (the legal fee being in a mortgage,) is not liable in covenant, as assignee of all the estate, right, title, and interest, of the original covenantor.

The Mayor, &c. of Carlisle v. Blamire,
T. 47 G. 3. 487

5. Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial, incorporated by divers names of incorporation, and at the time of making the indenture by A. B. declared on, were known by a certain other name, by which name A. B. granted to them a certain watercourse, and covenanted for quiet enjoyment: held that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken upon that fact. *ib.*

CROPS GROWING.

See DEVISE, No. 4.

DAMAGE.

See EVIDENCE No. 1. or SLANDER, 1.
VERDICT, 1.

DEBT.

See BANKRUPT, No. 4. or LANDLORD
AND TENANT, 6. INSOLVENT DEBT-
OR, 3.

DELIVERY OF GOODS.

See WEST INDIA DOCK COMPANY,
No. 1.

DEPOSITIONS.

Where a party obtains leave, by consent, to examine witnesses abroad on depositions, he is not entitled to be allowed the expence of taking the depositions in the taxation of costs, though he succeed. *Taylor v. The Royal Exchange Assurance Company, E. 47 G. 3.* 393

DESCRIPTION OF LANDS.

See DEVISE, No. 1, 3.

DEVISE.

1. One having purchased of A. the manor and certain lands of and in Ham-

preston in the counties of Dorset and Hants, and having settled a rent-charge on his wife out of his manor of *Hampreston in the county of Dorset*, and all other his lands, &c. in *Hampreston* aforesaid, which he bought of A.; and having afterwards purchased of other persons other lands in *Hampreston in Hants*, (which were near to another estate of his called *Uddens in Dorset*;) by his will, reciting and confirming the settlement devised to trustees, "the said manor, &c. and other hereditaments of and in *Hampreston* AFORESAID, and all other the manors, lands, farms, &c. and other hereditaments in or near *Uddens* aforesaid, or elsewhere in the said county of Dorset," to trustees for different uses; amongst others, giving his wife an additional rent-charge, payable out of the manors and hereditaments in the said county of Dorset: and as to all and singular the said manors and other hereditaments in the said county of Dorset, with other appurtenances, &c. charged as aforesaid, he devised the same to the first and other sons of his body, remainder to his daughters in strict settlement; and if all but one of his daughters died without issue, "then as to the entirety of the said manors and other hereditaments," to the daughters of his remaining daughter in tail; &c. remainder to the lessor of the plaintiff, his nephew, and heir at law; remainder to his sons and daughters in strict settlement; remainders over to other junior nephews in like manner: with power to the trustees to raise money on the security "of the manors and other hereditaments in the said county of Dorset," and also to sell the devised lands, except such as were situate at *Uddens*, or *Hampreston* aforesaid, and to purchase other lands in fee within the said manor of *Hampreston*, in the said county of Dorset," &c. The deviser, by a subsequent codicil, in which he speaks of the prior devise of his *Dorsetshire* estate, revoked the devise to the lessor of the plaintiff. Held that the *Hampreston* lands lying in *Hants*, and not

not purchased of A; though situated within and surrounded by the general ambit of Dorsetshire, and also near Uddens, and holden together with, and as part of a Dorsetshire farm, did not pass by the will; which was confined in express terms to the manor and lands in *Hampreston*, purchased of A. (by force of the words "*said manor, &c. and hereditaments aforesaid*," referring to the recital of the settlement,) or which lay in the county of Dorset, (by the addition of the latter words; which would not have been necessary if the Devisor had meant to pass all his lands near Uddens, in whatever country situated.) For though where a thing is certainly expressed at first, the addition of another certain description may be rejected as superfluous; yet it is otherwise where the thing at first described is uncertain; as here, lands, &c. near Uddens. *Doe v. Greathed*, M. 47 G. 3. 91

2. One seised in fee, having only one daughter A. married to N. B., and two grandsons, W. T. B. and M. B. devised "as for my worldly and temporal estates, &c. I give to N. B. 1s.; and devised that he shall not come upon my premises or hereditaments on any account whatsoever. Then after giving a legacy to his grandson M. B., he devised to his daughter 20l. a year out of the profits of his ESTATE or lands at Eaton;" and then devised to his grandson W. T. B. "all his messuage and dwelling-house situate at Eaton aforesaid, with an hereditaments, &c. thereunto belonging, &c.; and that W. T. B. when 21 shall enter upon and enjoy the above-mentioned ESTATES, situate at Eaton aforesaid: but that if he should leave his profession, all his right and title to the estate devised should devolve and descend to his brother M. B.:" held that in order to effectuate the intention of the devisor to exclude, at all events, his son-in-law N. B. from coming upon his premises, &c. (which he would otherwise be entitled to do as tenant by the curtesy, if his son W. T. B. died before his mother); W. T. B. took a fee. Aided too, as that construction was, by the introductory words as to his world-

ly estate; by giving N. B. 1s.; by the annuity for life to his daughter, payable out of the same estate: and from the direction for the estate to descend and devolve to M. B. if his elder brother W. T. B. should leave his profession; (in which event M. B. would only have taken per autre vie.) But held that the annuity devised to his daughter A. out of the profits of the estate, being no charge upon the devisee, or upon the estate given to him, would not have passed the fee to W. T. B.: nor would the word estate, as here used in the devise to him; being by reference restricted to the antecedent words. *Doe v. Clayton* M. 47 G. 3. 141

3. A. having an estate in the county of Monmouth, of which he was seised in fee in possession; and another estate in the county of Radnor, of which he was also seised in fee, subject to the uses of his marriage settlement; (by which he covenanted to convey to the use of himself and his wife for life; remainder to his first and other sons in tail;) which left him in equity a disposing power over the reversion only; both which estates had formerly belonged to an uncle, and came to him, the one by descent, the other by purchase from another co-heir of his uncle; by his will, misreciting the estate of which he was seised in fee in possession to be in the county of Radnor, instead of Monmouth; and misreciting his disposable reversion to be in the county of Monmouth, instead of Radnor; devised his estate, so misdescribed to be in Radnor, which was in truth the reversionary estate, to his wife for life; remainder to his only son for life; remainder to his sons and daughters in tail, in strict settlement; remainder to his own daughter, &c. and devised the reversion only of his estate, so misdescribed to be in Monmouth, of which, in truth he was seised in fee absolute, after the death of his wife and only son without issue, to his daughter, &c.: yet held, that enough appeared on the face of the will, which also described these estates as formerly belonging to his uncle to shew that the devisor's intent was to

pass the present interests of his estate in fee absolute, which was in the county of *M.*, and the reversion of his settled estate in the county of *R.*; although he had respectively misdescribed their local situations. *Moseley v. Massey*, *M.* 47 G. 3. 149

4. The devisor having devised certain estates to *A.* in fee; and to his executors "all his money," &c. *stock upon his farm*, with the implements of husbandry, and *all other his personal estate* of what nature or kind soever, in trust to pay debts and legacies, &c.: held that the devise of the *stock upon his farm* carried the standing crops of corn growing there at the time of his death from the devisee of the land to the executors; although there were assets sufficient to pay all the debts and legacies without that aid. *West v. Moore*, *E.* 47. G. 3. 339
5. A mere right of entry, (the estate of the remainder-man having been divested by the fine of tenant for life) is not deviseable. *Goodright v. Forrester*, *T.* 47 G. 3, 552

DISTRESS.

See LANDLORD AND TENANT, No. 3.

DOCTOR OF LAWS.

See MANDAMUS. No. 2.

DUTIES.

See HORSE-DUTY.

EJECTMENT.

See FINE, No. 1. LANDLORD AND TENANT. WASTE, 1.

1. Where one leased for 21 years, if the tenant, his executors, &c. should for long continue to inhabit and dwell in the farm house, and actually occupy the lands, &c. and not let, set, assign over, or otherwise depart with the lease: held that the tenant having become bankrupt, and his assignees having possessed themselves of the premises and sold the lease, and the bankrupt being out of the actual possession and occupation of the farm, the lessor might maintain an ejectment without a previous re-entry; the continuance of the term itself being made to depend upon the lessee's actual occupation. *Doe v. Clarke*, *H.* 47 G. 3. 185
2. An ejectment against the bailiffs pro tempore of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs: in succession is merely evidence of a tenancy in the corporation. But at any rate such tenancy may be determined by a notice to the corporation to quit, served on its officers: after which, the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises. *Doe v. Woodman*, *H.* 47 G. 3. 228
3. Where the possession and receipt of rents, issues, and profits of a trust estate, though for above 20 years after the creation of the trust, without any interference of the trustees, is consistent with and secured to the cestuy que trust by the terms of the trust deed, such possession is not adverse to their title, so as to bar their ejectment against his grantees brought after the 20 years. *Keene v. Deardon*, *H.* 47 G. 3. 248
4. *A.*, a copyholder for life, remainder to *B.*, surrenders his own and *B.*'s estate, (over which latter he had no control, and by which he let in *B.*'s remainder,) and takes a new copy for the lives of himself, *C.*, and *B.*, successive; and on *A.*'s death, after 20 years had run against *B.*, *B.* enters on the possession then vacant: held that as against *C.*, who had no possession and no title, *B.* might defend his legal title, coupled with possession in ejectment; however 20 years adverse possession by *A.* might have barred *B.*'s possessory right as against him; or might have disabled *B.* if he had continued out of possession, from

from recovering in ejectment. *Doe v. Reade, E. 47 G. 3.* 353

5. After verdict in ejectment for a messuage and tenement, the Court will give leave to enter the verdict, according to the Judge's notes, for the messuage only, (pending a rule to arrest the judgment,) without obliging the lessor of the plaintiff to release the damages. *Goodtile v. Otway, E. 47 G. 3.* 357

ELECTION.

See CORPORATION, No. 2, 3, 5.

ENTRY, RIGHT OF.

See FINE, No. 1.

EQUITABLE INTEREST.

- A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of fieri facias at the suit of a judgment creditor. *Scott v. Scholey, T. 47 G. 3.* 467

EQUITY OF REDEMPTION.

See MORTGAGE, No. 2.

ERROR, WRIT OF.

See COSTS, No. 5.

1. A writ of error upon a judgment in debt on a recognizance of bail in a stay of execution; not being within the exception of the stat. 3. J. 1. c. 8. either as a judgement upon an obligation conditioned for payment of *money only*: (the recognizance being to pay money or do something else;) or as a judgment upon a *contract*, which is there used in contradistinction to an *obligation*. *Dell v. Wild, H. 47 G. 3.* 240
2. Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same court is not a supersedeas of execution as the first is: and execution may then be sued out without leave of the Court. But in error of matter of fact coram vobis, which is not within the statutes requiring bail in error, the writ of error is or

is not a supersedeas according to circumstances; and the Court must be moved for leave to sue out execution pending it. *Birch v. Trist, E. 47 G. 3.* 412

ESCAPE.

If an officer permit a prisoner to go at large on his promise to pay the debt to the creditor; in consequence of which he is obliged to pay the creditor himself; he cannot recover back the money from the debtor; being guilty of a breach of duty, out of which he cannot derive a cause of action. *Pitcher v. Bailey, H. 47. G. 3.* 171

ESTATE FOR LIFE.

See LANDLORD AND TENANT, No. 1.

EVIDENCE.

See HUNDRED. No. 1. WARRANTY, 1. WAY, 2.

1. Where special damage is necessary to sustain an action for slander, it is not sufficient to prove a mere wrongful act of a third person induced by the slander, such as, that he dismissed the plaintiff from his employ before the end of the term for which they contracted; but the special damage must be a legal and natural consequence of the slander. *Vicars v. Wilcocks, M. 47 G. 3.* 1
2. An indictment against certain commissioners for a contempt of an order of Sessions in not paying the costs of an appeal awarded against them; stating, generally, that the party appealed to the Sessions against a certain notice in writing under the hands of five commissioners acting in the execution of the statute, and *which notice was made or purported to be made, under the powers to them given by the act*; seems sufficient; for the Court will presume, as against the persons issuing such notice, that it was signed by them when lawfully assembled at the public meeting holden by virtue of the act. *The King v. Kingston, and others, M. 47 G. 3.* 41
- 3- The party interested in a witness's testimony, who was objected to on account of

of his having been convicted of felony, and his imprisonment being unexpired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself. *The King v. The inhabitants of Castell Careinion*, M. 47. Geo. 3. 77

4. The original book of acts, directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party to whom the administration is directed to be granted of the intestate's effects, without producing the letters of administration themselves; notwithstanding subsequent letters of administration granted to another; the first not being recalled. *Elden v. Keddell*, H. 47 G. 3. 187

5. Where a licence to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, and did not know what was become of it, having afterwards searched for, but not recollecting the finding it, and thinking that he had not found it; this is reasonable and probable evidence of the loss of such licence, so as to let in parol evidence of its contents: the paper not being considered as of any further use at the time; and the witness's attention not having been then called particularly to the circumstances. And the witness may speak to the contents of the licence from memory, though he had made an entry of it in his memorandum book, for the private information of himself and the governor; which book was not produced; he having given it to the governor, who was gone abroad without returning it to him; for such book, if in court, would not have been evidence per se; but could only have been used by the witness to refresh his memory. *Kennington v. Inglis*, H. 47 Geo. 3. 273

6. It lies on a party summoned as a witness before commissioners of bankrupt, having a lawful excuse for not attending, to prove the fact in an action of trespass

and false imprisonment, brought by him for such arrest; supposing that a present inability to bear the expence of the journey is a lawful impediment. *Battye v. Gresley*, E. 47 G. 3. 319

7. Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by A. B. which they declared on, were known by a certain other name, by which name A. B. granted to them a certain watercourse, and covenanted for quiet enjoyment: held that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time upon an issue taken on that fact. *The Mayor, &c. of Carlisle v. Blamire*, T. 47 G. 3. 487
8. Hearsay evidence of the declaration of a deceased father, as to the place of birth of his bastard child, is not admissible to prove the birth settlement of such child. *The King v. The Inhabitants of Erith*, T. 47 G. 3. 539
9. Where an instrument is produced at the trial by one of the parties, in consequence of notice from the other; which when produced appeared to have been executed by the party producing it and third persons, and to be attested by a subscribing witness; the production of it in that manner does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it. *Gorden v. Secretan*, T. 47 G. 3. 548

EXECUTION.

See ERROR, WRIT OF.

1. Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same court is not a supersedeas of execution as the first is: and execution may then be sued out without leave of the Court. But in error of matter of fact coram vobis, which

which is not within the statutes requiring bail in error, the writ of error is or is not a supersedeas according to circumstances; and the Court must be moved for leave to sue out execution pending it. *Birch v. Triste*, *E. 47 G. 3.*

412

2. A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of fieri facias at the suit of a judgment creditor. *Scott v. Scholey*, *T. 47 G. 3.*

467

FALSE IMPRISONMENT.

The defendant cannot justify an assault and false imprisonment of *A. B.* by shewing a latitat issued against *C. B.*, and averring that it was issued against *A. B.*, by the name of *C. B.* and that they are one and the same person; there being no averment that *A. B.* was known as well by the name of *C. B.* *Shadgett v. Clipson*, *E. 47 G. 3.*

328

FELONY.

The party interested in a witness's testimony, who was objected to on account of his having been convicted for felony and his imprisonment being unexpired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself. *The King v. The Inhabitants of Castell Carcinion*, *M. 47 G. 3.*

77

FINE.

1. The fine of a tenant for life devests the estate of the remainder-man or reversioner, leaving in him only a right of entry, to be exercised either then, by reason of the forfeiture, or within five years after the natural determination of the preceding estate. And the effect of the stat. 4 *H. 7. c. 24.* is only to save to all the remainder-men their respective rights of entry within five years after their respective titles accrue, without a subsequent remainder-man being prejudiced by the laches of another remainder-man who preceded him. *Goodright v. Forrester*, *T. 47 G. 3.*

552

2. The effect of a fine by tenant for life of parcel of a manor, the reversion of

which parcel was in the tenant in fee in possession of the other parts of the manor, is to sever such parcel from the manor.

552

FREIGHT.

1. By a charter-party of affreightment the owner of the ship covenanted to take on board at *London* the freighter's goods, and proceed therewith to *Monte Video*, and there to deliver them to the freighter's agent, and receive from him another cargo and (wind and weather permitting) proceed therewith to his port of discharge in *G. B.*, and there deliver the same to the freighter, and end the said voyage. In consideration whereof the freighter covenanted to pay 670*l.* per month for freight, during the said intended voyage to *M. V.* and back to her port of discharge: such freight to commence from the day the ship should be ready to receive her outward bound cargo, and to end when she should have finally discharged the whole; and also to pay two-thirds of all pilotage and port-charges during the said voyage; such freight, pilotage, and port-charges to be paid on the arrival and discharge of the ship at her destined port in *G. B.*---

In covenant by the owner for an alledged breach in non-payment of freight, pilotage, and port-charges, it is not enough to shew that the ship, after having taken in a cargo in *G. B.* and proceeded part way on the voyage, but before her arrival at *M. V.* was, without the default of the owner or crew, wrongfully seized and brought back to *London*, and there detained for some time, till she was restored to the owner; in consequence of which she required repairs, which were done with all necessary dispatch, and that the owner was then ready and willing to cause the ship to prosecute and complete her voyage, and gave notice thereof to the freighter, and tendered him the ship properly fitted, &c. for that purpose and requested him to give the necessary instructions in that behalf, and offered to observe the same, &c. but that the freighter

freighter would not give any such instructions, &c. nor permit the ship to prosecute or complete the voyage; but refused to do so, and wholly renounced the charter-party, and the further prosecution of the voyage, and wholly discharged the owner from further prosecuting or completing the voyage, and dispensed therewith.

For the freight (qua freight,) pilotage, and port-charges, are only covenanted to be paid by the freighter on the arrival and discharge of the ship at her destined port in G. B., and therefore such arrival and discharge, (which must be understood after the stipulated voyage performed,) are conditions precedent to the owner's right to freight, &c. And it is not enough to shew that the owner did all in his power towards earning the freight, &c. by the tender of his ship to complete the voyage, and his offer to obey the freighter's instructions; because, though the owner had actually done, as far as lay in his power, all that he offered to do, and which the freighter discharged him from doing, it would only have amounted at most to an endeavour on his part to complete the voyage and earn the freight, &c. but such completion was still liable to be defeated by the act of God, or the accidents of the voyage: and the performance of the condition which was to entitle the owner to freight, &c. would still have been contingent, although such his offers had been accepted by the freighter. Therefore this is not like the cases where a party tendering to do that which he has undertaken, and which he has the immediate power of doing at the time, in order to entitle himself to a concurrent duty from another, is by a refusal of that other to accept such tender, dispensed with the necessity of averring performance of it, in an action for a breach in not performing the subsequent or concurrent duty. *Smith v. Wilson*, E. 47 G. 3. 437

GENERAL ISSUE.

A defendant, in trespass, cannot justify,

GUARANTIE.

under the general issue, the cutting the posts and rails of the plaintiff, though erected upon the defendant's own land: there being no question raised as to the property remaining in the plaintiff. *Welch v. Nash*, E. 47 G. 3. 394

GRANT.

An inclosure act having directed that the allotments made by the commissioners should for ever remain for the benefit of the appointees: held that an award and assignment of the *herbage* of a certain close to the surveyors of the highways and their successors, for the benefit of the parish of B., though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take; the same as if the terms of the award had been specifically enacted. And the lord of the manor, in whom the fee of the soil remained, is a trustee for the surveyors of the highways for the time being. *Johnson v. Hodjson*, M. 47 G. 38

GROWING CROPS.

See DEVISE, No. 4.

GUARANTIE.

1. A guarantie in writing, for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception of the stamp acts, "a contract for or relating to the sale of goods," and need not be stamped. *Warrington v. Furber*, H. 47 G. 3. 242
2. The vendee having accepted a bill of exchange for the price of the goods, and becoming bankrupt before the bill became due, the guarantee who paid the vendor after the bankruptcy of the vendee may recover back the money from the latter, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; and the notorious insolvency of the vendee acceptor being at least a prima facie warrant

rant to the guarantee to dispense with the making of such demand by the vendor who held the bill: however, it might still be competent for the vendee to defend himself against this action by the guarantee, by shewing that if a demand for payment had been made upon him by the holder, the bill would have been paid. *Warrington v. Furber, H.* 47 G. 3. 242

HABEAS CORPUS.

See SEAMEN, No. 1.

HIGHWAY.

See WAY.

Under the 19th sect. of the general highway act 13 G. 3. c. 78. a new highway must be set out before an old one can be stopped up; and it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. And if a new highway be not set out before the old one be stopped up, the legality of the order of the justices for diverting the old road and stopping it up may be questioned in an action of trespass, notwithstanding such orders were confirmed by the Sessions on appeal, stating the fact of a new road being set out in lieu of the old one. *Welch v. Nash, E.* 47 G. 3. 394

HORSE DUTY.

1. By stat. 44 G. 3. c. 98. schedule B. the duty, which before was laid on horses let to hire for *travelling post* by the mile or stage, is now laid on horses let to hire to travel by the mile or stage: and persons licensed by schedule A. of that act to let horses to hire to travel post, by the mile or stage, must account for the duty according to schedule B. on such lettings to hire as are therein mentioned. But, quære, as to lettings to hire for the day to go to certain places and back again. *Welsford v. Todd, T.* 47 G. 3. 580
2. The same construction was put upon a hiring of a hackney coach under the *Liverpool* act. *Rex v. Swift, Excheq.* M. 30 G. 3. cited *ib.* 584

HUNDRED.

The declaration in an action on the statute 9 G. 1. c. 22. s. 8., to recover damages against the hundred for the value of a stack of corn maliciously burnt, alleged that notice of the fact was given within two days to the inhabitants of the *parish* (instead of the "town, village, or hamlet," which are the words of the act,) near the place, &c.; yet as the law *prima facie* intends every *parish* to be a *vill*, unless the contrary be shewn, this allegation is sufficient after verdict to sustain judgment for the plaintiff. But if it had been shewn at the trial that the parish consisted of several vills, and that the notice had been given to one more distant than another, the defendants would have been entitled to a verdict. *Cook v. The Hundredors of Pimhill, H.* 47 G. 3. 173

INCLOSURE ACT.

See STATUTE, No. 1.

INDEMNITY.

Bail who are indemnified, being sued upon the bail-bond, file a bill in equity for an injunction, suggesting want of consideration for the original debt; and an injunction is granted *pro tempore* on condition of paying the debt into court; which is done accordingly; and afterwards the money is paid over: held that the bail were damnified by such payment of money into court, after the notice to the debtor, and no fund provided by him; and not merely from the time when the money was taken out of court upon dissolving the injunction. For one who agrees to indemnify, and save others harmless against a certain engagement, is bound to secure them from incurring any expence as it runs on at the time, which falls upon them by virtue of that engagement. *Sparks v. Martindale, T.* 47 G. 3. 593

INDICTMENT.

See MANDAMUS, No. 1. WAY, 1, 2.

1. It is no objection, on demurrer, that several

several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the Court to quash the indictment. *The King v. Kingston and Others*, M. 47 G. 3. 41

2. And an indictment against certain commissioners for a contempt of an order of Sessions in not paying the costs of an appeal awarded against them, stating, generally, that the party appealed to the Sessions against a certain notice in writing under the hands of five commissioners acting in the execution of the statute; and which notice was made, or purported to be made, under the powers to them given by the act, seems sufficient; for the Court will presume as against the persons issuing such notice, that it was signed by them when lawfully assembled at a public meeting holden by virtue of the act. (*Vid. Appeal*, No. 1 & 2.) *ib.* 41

3. But counts in the indictment stating an appeal against a notice in writing, signed by A., B., C., D., and E., five of the commissioners, and an order by the Sessions that *the commissioners acting under the statute, and being the respondents in the said appeal*, on service of the said order, should pay the appellant 10*l.* costs of appeal; and alleging *service of the order on those five and others acting as commissioners, &c.*; and then charging, that at a subsequent meeting held by virtue of the act, A., B., (*omitting C.*) D. and E., and also F. and G., commissioners were present and acting, and formed a majority, a demand of the 10*l.* costs was made on *those six*, which they refused to pay: and other like counts, charging service of the order upon part only of those who were indicted for a contempt of it, were on general demurrer, holden bad. And the offence being laid *jointly* against the several sets of defendants in each count, the Court could not give judgment, on such an indictment, even against the *four* who were parties to the appeal, and on whom service of the

order was alleged; there being no one count including those only. *ib.* 41

4. A defendant in an indictment for a misdemeanor cannot plead over to the charge after a plea in abatement for a misnomer, on which issue is taken and found against him. *The King v. Gibson*, M. 47 G. 3. 107

5. Upon an indictment for perjury removed into B. R. by certiorari, if the prosecutor give notice of trial to the defendant, and withdraw his record without countermanding his notice in time, he shall pay costs to the defendant. *The King v. Bartrum*, H. 47 G. 3. 269

6. Any person making or knowingly using a false affidavit taken abroad (though perjury could not be assigned on it here) in order to mislead our own courts, and to pervert public justice, is punishable by indictment as for a misdemeanor. *Omealy v. Newell*, E. 47 G. 3. 364

INFANT.

An infant can on no account bind himself in a bond with a penalty conditioned for payment of interest as well as principal. *Fisher v. Mowbray*, E. 47 G. 3. 330

INFERIOR JURISDICTION.

See COURT OF REQUESTS.

INSOLVENT DEBTORS.

See INDEMNITY, No. 1.

1. The insolvent debtors' act of the 41 G. 3. c. 70. only discharges the person, and not the effects of the debtor, as appears by s. 38. giving the plea of discharge; though s. 4. in the terms of it includes both, but with reference to the subsequent provision. *Bell v. Saunderson*, M. 47 G. 3. 55

2. It is not enough, in an order for remanding an insolent debtor by the Sessions, to state that it appeared that he had obtained goods of A. B. (at whose suit he was detained) by false pretences; for either it should be stated in the words of the stat. 41 G. 3. c. 70. s. 40.

- s. 40. (by virtue of which the order was made) that the party *knowingly and designedly* by false pretences obtained the goods; or at least, that he *fraudulently*, by false pretences obtained them; the description of the offence adopted by the stat. 46 G. 3. c. 108.
- s. 39. with reference to the former statute; (which word *fraudulently* is also used in the recital of the section in the former act.) and a second order of remand, however regular under the last statute, professing to be made upon view of the former defective order, was therefore quashed. But it is competent to any existing creditor to object to the discharge of an insolvent debtor, on due proof of such former offence described in the statute; though he were not a creditor at the time of such former order of remand made. *The King v. Tomkins*, H. 47 G. 3. 18
3. Where the defendant in the action gave a cognovit for the debt and costs payable by seven instalments; and after the bail were fixed an act passed for discharging insolvent debtors in custody for debts due at a certain day, prior to the bail being fixed, at which day three only of the instalments were payable; and afterwards the principal was discharged under the act, when only two more of the instalments had become payable; yet held that the bail were liable for the whole condemnation-money; the entire debt, qua debt, being due instant, with a stay of execution only for certain portions at certain times. *Shakespeare v. Philips*, E. 47 G. 3. 433
- going into an enemy's settlement to trade (which was permitted by the enemy) though his cargo could be more speedily and cheaply completed there; but such act, in consequence of which the ship was seized and confiscated, is barratrous. *Earl v. Rowcroft*, M. 47 G. 3. 126
2. So is sailing out of port, without paying port duties, whereby the goods are forfeited, lost, or spoiled. *Knight v. Cambridge*, cited. *ib.* 135
3. And it matters not that the captain is also supercargo. *ib.*
4. Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st of October 1799 and the 1st of June 1800; a memorandum written on the policy on the 11th of June, extending the time of sailing to the 1st of August 1800, does not require a new stamp; being within the 13th section of the stat. 35 G. 3. c. 63., which provides that the act of imposing the stamp shall not extend to prohibit the making any lawful alteration in the terms or conditions of any policy, &c. *Kensington v. Inglis*, H. 47 G. 3. 273
5. Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, was licenced by the king's authority; held that an insurance on the *enemy's ship*, as well as on the goods and specie put on board for the benefit of the *British* subjects, was incidentally legalized; and that it was competent for the *British* agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue. *Kensington v. Inglis*, H. 47 G. 3. 273
6. A policy effected on "ship and out-fit" on a voyage upon the Southern Whale Fishery out and home, cannot be altered by consent, after the ship sails, and the risk attaches, to an insurance on "ship and goods," without a new stamp; *out-fit*,

INSURANCE.

1. Barratry is any fraudulent or criminal conduct against the owners of ships or goods by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners; although it may not be done with intent to injure them, or to benefit at their expence the master or mariners. And therefore, where a master had general instructions to make the best purchase with dispatch; this would not warrant him in

out-fit, the subject matter of insurance, being essentially different in such a voyage from *goods*; and therefore not within the exception of the stat. 35 G. 3. c. 63. s. 13. which enables alterations to be made in the *terms or conditions* of a policy, without having a new stamp, so that *the thing insured remains* the property of the same persons, &c. *Hill v. Patten*, E. 47 G. 3. 373

7. It seems however that shifting or successive cargoes on board the same ship in the course of the same adventure, (as in the *African* and other trades,) out and home, may be covered by an insurance on *goods*. *ib.*

INTEREST,

See INFANT, No. 1.

JUDGMENT,

See VERDICT, No. 1.

JURISDICTION,

See COURT OF REQUESTS.

1. The *St. Alban's* paving and regulating act, 44 G. 3. empowers five commissioners, *assembled at a public meeting holden by virtue of the statute*, to do certain acts; amongst others, to deliver *notice in writing* to any inhabitants to abate nuisances and encroachments in the street before their houses; and on failure, empowers the commissioners to abate them; and gives an *appeal* to the Quarter Sessions of the borough "against any matter or thing to be done by the commissioners in pursuance of the act;" held that an *appeal* lay against such *notice in writing*; such construction being within the words of the act, &c. and most beneficial for the commissioners themselves, as well as for the inhabitants whose property was to be affected by such acts. *The King v. Kingston and Others*, M. 47 G. 3. 41
2. Though the act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or *appeal*, for any cause relating to the act, or any thing done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer; it does not extend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them; however, they may afterwards recoup themselves out of the fund in the treasurer's hands. 41
3. The statute 20 G. 2. c. 19. giving the magistrates jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, potters, &c. "and *other labourers*" employed for any certain time, or in any other manner, respecting wages within certain sums, extends to *labourers of all descriptions*, and not merely in the particular trades or business there enumerated: and consequently includes *wages* earned by a *labourer*, who contracted to dig an *istean* a well for cattle, to be paid for by the foot, and who employed another to assist him in the work. *Lowther v. The Earl of Radnor*, M. 47 G. 3. 113
4. The party appealing to the Sessions is not thereby precluded from afterwards disputing its jurisdiction in the particular case. *Lowther v. The Earl of Radnor*, M. 47 G. 3. *ib.*
5. Trespass lies not against magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction; though the real facts of the case might not have supported such complaint; if such facts were not laid before them at the time by the party complained against, having due notice of such complaint, and being properly summoned to attend. *ib.*
6. By the general highway act 13 G. 3. c. 78. a new highway must be set out before an old one can be stopped up. and it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. And if a new highway be not set out before the old one be stopped up, the legality of the orders of the justices for diverting the old road and stopping it up, may be ques-

ques-

questioned in an action of trespass, notwithstanding such orders were confirmed by the Sessions on appeal stating the fact of a new road being set out in lieu of the old one. *Welch v. Nash, E.* 47 G. 3. 394

7. The propriety of granting a warrant, by commissioners of bankrupt, for the arrest of a witness refusing to obey their summons, being an act of discretion, must be determined upon by the commissioners acting together at the time. And their order to their officer to make out such warrant must be taken to include their direction as to the persons to whom it is to be directed: but the mere act of signing the names of the commissioners to the warrant may be done by them separately. *Battye v. Gresley, E.* 47 G. 3. 319

KIN.

See ADMINISTRATION, No. 3.

LABOURERS.

See MASTER AND SERVANT No. 1.

LANDLORD AND TENANT.

1. An agreement to lease at a certain rent, and that the lessor should not turn out the tenant *so long* as he paid the rent, and did not sell any article injurious to the lessor's business, either purports to be a lease for life, and would then be void, as not being creatable by parol; or if it operate as a tenancy from year to year, it must necessarily be determinable by either party giving the regular notice to quit. *Doe v. Browne, H.* 47. G. 3. 165.
2. Where one leased for 21 years, if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farm house, and actually occupy the lands, &c. and not let, set, assign over, or otherwise depart with the lease; held that the tenant having become bankrupt, and his assignees having possessed themselves of the premises and sold the lease, and the bankrupt being out of the actual possession and occupation of the farm, the lessor might maintain

ejectment without a previous re-entry; the continuance of the term itself being made to depend upon the lessee's actual occupation. *Doe v. Clarke, H.* 47 G. 3. 185

3. An ejectment against the bailiffs pro tempore of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But at any rate such tenancy may be determined by a notice to the corporation to quit, served on its officers; after which, the owner of the premises may destrain the cattle of any persons trespassing on his ground; or bring his action against them; or maintain ejectment against any person in the actual possession of the premises. *Doe v. Woodman, H.* 47 G. 3. 228
4. If *trees* be excepted out of a demise, waste cannot be committed by cutting them down; and therefore ejectment cannot be brought as for *waste* committed in or upon the demised premises. *Goodright v. Vivian, H.* 47 G. 3. 190
5. Assumpsitlies against a lessee from year to year upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued; which were pleaded in bar. *Boot v. Wilson, E.* 47 G. 3. 311
6. Debt does not lie against a bankrupt on the *reddendum* of a lease for rent accruing after the commissioners' assignment; the lessor's assent to such assignment being virtually included in the act of parliament authorizing the assignment of the bankrupt's estate. *Wadham v. Marlowe, M.* 25 G. 3. 314 n.
7. Where a demise is for a certain time, no notice to quit is necessary at or before the end of the term, to put an end to the tenancy: but a demand of possession and notice in writing, &c. are necessary

necessary to entitle the landlord to double rent or value; and such demand may be made for that purpose above six weeks afterwards, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy; and he will thereupon be entitled to double value as from the time of such demand, if the tenant hold over but if the rent were before reserved quarterly and such demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter. *Cobb v. Stokes*, *E.* 47 G. 3. 358

LARCENY,

See NAVAL STORES.

LAND-TAX,

This is, in the frame of it, a personal tax. *Rex. v. The Inhabitants of Armouth*, *E.* 47 G. 3. 386

LEASE,

See LANDLORD AND TENANT, No. 1, 2.

LICENCE,

See COPYHOLD, No. 2.

1. A parol licence to put a sky-light over the defendant's area, (which impeded the light and air from coming to the plaintiff's dwelling-house through a window,) cannot be recalled at pleasure after it has been executed at the defendant's expence; at least not without tendering the expences he had been put to: and therefore no action lies, as for a private nuisance, in stopping the light and air, &c. and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light. *Winter v. Brockwell*, *E.* 47 G. 3. 308
2. Such a parol licence is not within the statute of frauds.

LIVERPOOL HACKNEY
COACHES.

See HORSE-DUTY. No. 2.

MANDAMUS.

LONDON.

See COURT OF REQUESTS, No. 2. 4.

LOTTERY.

See CONVICTION, No. 1, 2.

MANDAMUS.

See POOR-OVERSEERS, No. 2.

1. A defendant indicted here for misdemeanors committed by him in the *West Indies* in a public capacity under stat. 42 G. 3. c. 85. is not entitled under that statute upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of mandamus to the courts, &c. abroad, to examine witnesses; which are directed to be issued in such cases at the discretion of the Court of *B. R.*; but he must lay before the Court such special grounds by affidavit as may reasonably induce them to think that the witnesses sought to be examined are material to his defence. But the prosecutor in such case is of course entitled to writs of mandamus for the like purpose. *The King v. V. Jones*, *M.* 47 G. 2. 31
2. No mandamus lies to the archbishop of Canterbury to issue his fiat to the proper officer, &c. for the admission of a doctor of civil law, graduated at *Cambridge*, as an advocate of the Court of Arches. *The King v. The Archbishop of Canterbury*, *H.* 47 G. 3. 213
3. A charter having granted that upon the death or amotion of a principal burghess (*who is appointed to hold for life*) it should be lawful for the mayor and the remaining principal burgesses, *within eight days next following*, to elect another; the eight days after a vacancy having slipped without an election, a mandamus was granted upon the stat. 11 G. 1. c. 4. s. 2. to make an election. *The King v. The Mayor, &c. of Thetford*, *H.* 47 G. 3. 270
4. If a presiding officer, who by the constitution of the borough forms an integral part of an elective assembly, depart from it after the meeting has been regularly

larly formed, and the election entered upon, but before it is completed, an election made after his departure is void. *The King v. Buller*, E. 47 G. 3. 389

5. A mandamus lies to the ordinary to grant administration to a sole next of kin, or to one of the next of kin if there be several. *Rex v. The Inhabitants of Horsley*, E. 47 G. 3. 408

MANOR.

See FINE, No. 2.

MASTER AND SERVANT.

The stat. 20 Geo. 2. c. 19. giving the magistrates jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, potters, &c. "and other labourers," employed for any certain time, or in any other manner," respecting wages within certain sums, extends to *labourers* of all descriptions, and not merely in the particular trades or business there enumerated: and consequently includes *wages* earned by a *labourer*, who contracted to dig and stean a well for cattle, to be paid for by the foot, and who employed another to assist him in the work. *Lowther v. The Earl of Radnor*, M. 47 G. 3. 113

MIDDLESEX.

See COURT OF REQUESTS, No. 3.

MISDEMEANOR.

See INDICTMENT, No. 4. MANDAMUS, 1.

MISDESCRIPTION OF LANDS
IN A WILL.

See DEVISE, No. 3.

MORTGAGE.

1. Though a bill of *sale* for *transferring the property* in a ship by way of mortgage may be void, as such, for want of reciting the certificate of registry therein, as required by stat. 26 G. 3. c. 60. s. 17.; yet the mortgagor may be sued upon his personal covenant

contained in the same instrument for the re-payment of the money lent. *Kerrison v. Cole*, H. 47 G. 3. 231

2. The devisee of the equity of redemption, (the legal fee being in a mortgage,) is not liable in covenant, as assignee of *all* the estate, *right, title, and interest, of the original covenantor*. *The Mayor, &c. of Carlisle v. Blamire*, T. 47 G. 3. 487

NAVAL STORES.

One convicted upon the stat. 9 & 13 W. 3. c. 41. s. 2. of having unlawfully in his possession, or concealing, the king's naval stores, cannot since the stat. 39 & 40 Geo. 3. c. 89. s. 2. be sentenced to hard labour. *The King v. Bridges*, M. 47 G. 3. 53

NOTICE TO QUIT.

See LANDLORD AND TENANT, No. 1. 3. 7.

NUISANCE,

A parol licence to put a sky-light over the defendant's area, (which impeded the light and air from coming to the plaintiff's dwelling-house through a window) cannot be recalled at pleasure after it has been executed at the defendant's expence; at least not without tendering the expences he had been put to: and therefore no action lies for a private nuisance, in stopping the light and air, &c. and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light. *Winter v. Brockwell*, E. 47 G. 3. 308

OFFICER.

See ESCAPE, No. 1.

ORDER OF JUSTICES.

See BASTARDY, No. 1, 2. INSOLVENT DEBTORS, 2.

OUTLAWRY.

Upon the defendant's coming in to reverse an outlawry in a civil case, upon
K k 2 the

the stat. 4 & 5 W. & M. c. 18. the usual form for taking the recognizance of bail is to pay the condemnation money; and not in the alternative, to pay it, or render the defendant. *Mathews v. Gibson*, T. 47 G. 3. 527

OVERSEER.

See POOR-OVERSEER.

PARISH.

See HUNDRED.

PENAL LAWS AND PENALTIES.

See COMPOUNDING PENALTIES.

In an action on the stat. 2 & 3 Ed. 6 c. 13. for the treble value of tithe corn, omitted to be set out, it is not enough for the defendant to shew the existence, *in fact*, of a custom in the parish to set out the 11th instead of the 10th mow; for the validity as well as existence of such a custom is properly triable in this form of action, though penal in its nature; being given to the party grieved, and his only remedy at common law for subtraction of the tithe due to him. *Phillips v. Davies*, H. 47 G. 3. 178

PLEADING.

See WAY, No. 1, 2.

1. Where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of; it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken. As where the plaintiff declared that in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, &c. which should be worth 80*l*. and be a young horse; and then alleged a breach in both those respects: held sufficient; though the proof were not only of a promise that

the second horse should be worth 80*l*. (which it was not) and be a young horse, but also of a warranty that it was sound and had never been in harness. *Miles v. Sheward*, M. 47 G. 3. 7

In covenant, breaches assigned generally against the defendant for having made cordage for *divers persons*, and for employing *other persons* than the plaintiff's to make cordage for his friends, &c. were held to be well assigned; though no particular persons were named, nor the quantities or kinds of cordage mentioned, &c.; such facts lying more particularly within the defendant's knowledge. *Gale and Others v. Reed*, M. 47 G. 3. 80

(And vide tit. COVENANT, No. 1.)

3. A defendant in an indictment for a misdemeanor cannot plead over to the charge after a plea in abatement for a misnomer, on which issue is taken and found against him. *The King v. Gibson*, M. 47 G. 3. 107

4. A plea of tender *after* the day of payment of a bill of exchange, and *before* action brought, is not good; though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the *whole money* then due, owing, or payable to the plaintiff in respect of the bill, with interest, from the time of the default, *for the damages* sustained by the plaintiff by reason of the non-performance of the promise. *Hume v. Peploe*, H. 47 G. 3. 168

5. *Qu.* Whether a special plea in bar, stating no facts but what might have been proved under the general issue, but leaving other facts unanswered which the general plea would have put in issue, be good. *Boot v. Wilson*, E. 47 G. 3. 311

6. The defendant cannot justify an assault and false imprisonment of A. B. by shewing a latitat issued against C. B., and averring that it was issued against A. B. by the name of C. B., and that they are one and the same person; there being no averment that A. B. was known as well by the name of C. B. *Shadgett v. Clipson*, E. 47 G. 3. 328

7. Par-

7. Partiality and improper conduct in an arbitrator, in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond, conditioned for the performance of the award; but is only matter for application to the equitable jurisdiction of the Court to set aside the award. Neither can a parol agreement between the parties to wave and abandon the award be pleaded to such action. *Braddick v. Thompson*, E. 47 G. 3. 344

8. A defendant in trespass, cannot justify, under the general issue, the cutting the posts and rails of the plaintiffs, though erected upon the defendant's own land; there being no question raised as to the property remaining in the plaintiff. *Welch v. Nash*, E. 47 G. 3. 394

9. In slander the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against him in the Court of Exchequer by the defendant, (but did not proceed to aver any colloquium respecting that answer, with reference to which the words were spoken;) and then alleged that the defendant said of him, that he was *forsworn*; innuendo, that the plaintiff had *perjured* himself in what he had sworn in his *aforesaid answer to the bill so filed against him*: held that this innuendo could not, without the aid of such a colloquium, enlarge the sense of the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in. *Hawkes v. Hawkey*, E. 47 G. 3. 427

10. It is sufficient to state the substance of fines and recoveries in a special verdict, where the legal result only is material. *Goodright v. Forrester*, T. 47 G. 3. 560

POLICE-OFFICE.

See CONVICTION, No. 3.

POOR---OVERSEERS.

1. Where one of two churchwardens was also appointed overseer of the poor, a

certificate of settlement signed by both is a nullity, and does not prevent an apprentice serving the certificated man in the certificated parish from gaining a settlement therein; for the certificate act 8 & 9 W. 3. c. 30. requires the certificate to be under the hands and seals of the churchwardens and overseers, or the major part of them, or of the overseers where there are no churchwardens; and there must be at least two overseers at the time. *The King v. The Inhabitants of St. Margaret's, Leicester*, E. 47 G. 3. 332

2. Although a parish might not have had the benefit of the statute 43 Eliz. c. 2. before and at the passing of the stat. 13 & 14 Car. 2. c. 12.; but perhaps at that period, and certainly for a long course of years antecedent to the years 1773---5 maintained its poor in separate districts, yet it was competent to the parishioners at the latter period to cease acting under the statute of Car. 2., and to recur to the general provision of the stat. 43 Eliz. by maintaining their poor as one entire parish: and having so done from the year 1775, the Court refused a mandamus to the justices of peace to appoint separate overseers as before that time. *The King v. Palmer*, E. 47 G. 3. 416

POOR RATE.

1. Where a coal-mine becoming unproductive ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, although he be still bound by his covenant to pay the rent reserved to his landlord. Aliter, where the mine is itself productive, although it be worked to a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner. *The King v. The Inhabitants of Bedworth*, E. 47 G. 3. 387

2. The owners of the packet-boats employed under a personal contract with the post-masters in carrying the mails, &c. between *Holyhead* and *Dublin*, are liable in respect of the profits accruing to them from the carriage of passengers and

and luggage in such boats, to be rated for the same in the parish of *Holyhead* where such owners reside, and from and to which the boats sail, where they are repaired, and where the passage-money is in part receivable and is collected; though they are registered in another place. *The King v. Jones*, T. 47 G. 3.

451

3. But in order to rate a person for personal property producing profit in a parish, not only the property must be within the parish at the time of making the rate, but the owner must come within the description of an *inhabitant* of such parish. *Rex v. Liverpool Parish*, H. 38 G. 3. *Rex v. Collison and Taylor*, E. 43 G. 3. and *Rex v. Howard*, M. 44 G. 3. B. R. cited in *Rex v. Jones*.

455---8

4. Where the farmer is rated for the whole farm, it is no ground of objection to the rate by a third person, that a dairyman who rented under the farmer his stock of cows to be depastured on the same land, was not rated for such dairy; although it were stated in the case that the dairyman made a profit of the produce of the cows, independent of the profits made by the farmer. For though such a taking of a dairy be a taking of a tenement in law, which will confer a settlement, yet that is in respect of the interest in the land; and the rate upon the farmer, for the whole farm, includes all the profit of the land and the stock appertaining to it: or considering the cows as personal stock, distinct from the land, they are the personal stock or capital of the farmer, not of the dairyman; and the latter only makes his profit by his labour out of the capital stock of another. *The King v. Brown*, T. 47 G. 3.

528

5. The occupier of a clay pit is rateable for the same. *ib.*

6. Silk throwsters, working up in their mills the silk of their employers sent to them for that purpose, are not liable to be rated in that respect, as for their stock in trade. *The King v. The Inhabitants of Sherborne*, T. 47 G. 3.

537

POST HORSE DUTY.

See HORSE DUTY.

POWER.

See TRUST AND TRUSTEES.

PRACTICE.

See AFFIDAVIT TO HOLD TO BAIL. BAIL. COURT OF REQUESTS. COSTS.

1. A defendant indicted here for misdemeanors committed by him in the *West Indies* in a public capacity under stat. 42 G. 3. c. 85. is not entitled under that statute, upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of mandamus to the courts, &c. abroad, to examine witnesses; which are directed to be issued in such cases at the discretion of the Court of B. R.; but he must lay before the Court such special grounds by affidavit, as may reasonably induce them to think that the witnesses sought to be examined are material to his defence. But the prosecutor in such case is of course entitled to writs of mandamus for the like purpose. *The King v. Jones*, M. 47 G. 3.

31

2. The Court will not compel an attorney, upon a summary application, to deliver up, on payment of his demand, a lease put into his hands for the purpose of making an assignment of it: there being no cause in court, nor any criminal conduct imputed to him in respect of it. *In the Matter of S. Lowe*, H. 47 G. 3.

237

3. A writ of error upon a judgment in debt on a recognizance of bail is a stay of execution; not being within the exception of the stat. 3 Jac. 1. c. 8. either as a judgment upon an obligation conditioned for payment of money only; (the recognizance being to pay money or do something else;) or as a judgment upon a contract, which is there used in contra-distinction to an obligation. *Dell v. Wild*, H. 47 G. 3.

240

4. In

4. In covenant upon a lease, a view being proper to be had, the venue was changed to the county where the premises lay; though most of the plaintiff's witnesses resided in the county where the venue was laid. *Hodinott v. Cor*, H. 47 G. 3. 268
5. Upon an indictment for perjury removed into B. R. by certiorari, if the prosecutor gave notice of trial to the defendant, and withdraw his record without countermanding his notice in time, he shall pay costs to the defendant. *The King v. Bartrum*, H. 47 G. 3. 269
6. After verdict in ejectment for a messuage and tenement, the Court will give leave to enter a verdict, according to the Judge's notes, for the messuage only, (pending a rule to arrest the judgment,) without obliging the lessor of the plaintiff to release the damages. *Goodtitle v. Otway*, E. 47 G. 3. 357
7. The plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause; notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs, &c. of the cause, *Howell v. Harding*, E. 47 G. 3. 362
8. Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same court is not a supersedeas of execution, as the first is: and execution may then be sued out without leave of the Court. But in error of matter of fact coram vobis, which is not within the statutes requiring bail in error, the writ of error is or is not a supersedeas according to circumstances; and the Court must be moved for leave to sue out execution pending it. *Birch v. Triste*, E. 47 G. 3. 412
9. The time limited by the stat. 9 and 10 W. 3. c. 15. s. 2. for setting aside awards, made under submissions by virtue of that statute, does not attach on awards made under orders of nisi prius. *Synge v. Jervoise*, T. 47 G. 3. 466
10. The sheriff cannot be ruled to bring in the body until the time for putting the bail has expired. *The King v. The Sheriff of Middlesex*, T. 47 G. 3. 525
11. Upon the defendant's coming in to reverse an outlawry in a civil case upon the stat. 4 and 5 W. & M. c. 18. the usual form for taking the recognizance of bail is to pay the condemnation money; and not in the alternative, to pay it, or render the defendant. *Matthews v. Gibson*, T. 47 G. 3. 547
12. Service of notice of plea filed on a Sunday is void, by construction of the stat. 29 Car 2. c. 7. s. 6. which avoids all process, &c. served on that day. *Roberts v. Monkhouse*, T. 47 G. 3. 547

PRESSING.

See SEAMEN, No. 1.

PRIZE.

A flag officer at the *Cape of Good Hope* sends a ship of his squadron within the limits of another flag officer's command in the *Asiatic* seas, for the special purpose of getting her repaired; and after the ship's going there and completing her repairs in the manner directed by the latter officer, and receiving an order from him to convoy certain ships on her return to her former station; while executing such order, being accidentally separated from her convoy, took a prize within the limits of the flag officer's command in the *Asiatic* seas, but in the course of rejoining her original flag officer at the *Cape*: held that the latter was not entitled to the flag officer's 1-8th share of the prize; his command over the ship being suspended while she was out of the limits of his own, and within the limits of another command. *Holmes v. Rainier*, T. 47 G. 3. 502

PROMOTIONS, &c.

1. Mr. Thomson, Mr. Hart, Mr. Martin, and Mr. Leach, were made King's Counsel in H. 47 G. 3. 296
2. Ld. Erskine resigned the Great Seal, which was re-delivered to Ld. Eldon, E. 47 G. 3. 297
3. Sir

3. Sir *V. Gibbs*, succeeded Sir *A. Pigott* as Attorney-General; and Sir *T. Plumer* succeeded Sir *S. Romilly* as Solicitor-General. 297
4. Mr. *Morris* was made a Master in Chancery in the room of Sir *W. W. Pepys*, Bart. who resigned. *ib.*
5. The Honourable *S. Perceval* was appointed Chancellor of the Exchequer, and of the Duchy of *Lancaster*. *ib.*
6. Mr. Baron *Sutton* received the *Irish Great Seal*, and was created Lord *Manners of Foston*. 298
7. Mr. *Wood* was made a Baron of the Exchequer, and knighted. *ib.*

RECOVERY IN FORMER ACTION.

See ASSUMPSIT, No. 5.

RENT.

See LANDLORD AND TENANT. No. 5. 7.

RE-ENTRY.

See LANDLORD AND TENANT, No. 2.

REGISTRY OF SHIPS.

See SHIP.

REMAINDER.

See FINE, No. 1.

REVENUE.

See HORSE DUTY.

SAINT ALBAN'S PAVING, &c. ACT.

See APPEAL, No. 1, 2. INDICTMENT, 1, 2, 3.

SALE.

See SHIP, No. 1. or VENDOR AND VENDEE, 1.

SALVAGE.

The commander of a stranded vessel having by the recommendation of the pilot, who came to his assistance, sent to the

defendant on shore, till then a stranger to him, to send all the help which was necessary; which he accordingly did; and under his direction (but also under the inspection of custom-house officers attending) the goods were brought on shore and housed under the joint locks of himself and the collector of the customs; and he paid all the salvors; held that this constituted him the agent of the owners, and took the case out of the statute 12 *Ann. st. 2. c. 18. s. 2.* for regulating the quantum of salvage by the award of three justices of peace; which statute only applies to cases where application is made by the owners, &c. to certain public officers named, and the salvage is made under their orders. *Baring v. Day*, M. 47 G. 3.

57

SEAMEN.

1. Where application had been made for the discharge of an impressed seamen before the two years of his protection by the stat. 13 *Geo. 2. c. 17.* were expired; which was then ineffectual, because the facts were not verified with sufficient certainty; yet the doubt being now removed by another affidavit, the Court granted a writ of habeas corpus for the purpose of liberating him, though the two years were now expired. *Ex parte Bruce*, M. 47 G. 3.

27

2. Seamen enter into articles to serve for monthly wages on board a ship "bound for the ports of *Madeira*, any of the *West India* islands, and *Jamaica*, and to return to *London*;" and it is agreed that they shall not demand or be entitled to their wages, or any part thereof, until the arrival of the ship at the port of discharge, &c. (meaning *London*): held that though the ship earned freight upon the delivery of an outward-bound cargo at *Madeira*, and of another cargo taken in at *Madeira* and delivered in the *West Indies*; yet that being lost in her passage home in a storm, the seamen could not recover wages pro rata upon the outward voyage, by reason of the express terms of the stipulation respecting

specting wages. *Appleby v. Dods, E.*
47 G. 3. 300

SETTLEMENT---BY APPRENTICESHIP.

Where the master and the father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving for five years, and find utensils, and that the son should receive half his earning, and the master the other half; under which the boy served out the time as an apprentice: held that this agreement between the father and master (to which the son was no party) not binding the son, or the father for him, to any service to the master; but the son's service in fact being merely voluntary; was no apprenticeship in point of law; and consequently no settlement could be gained by the son serving his master under such a contract. *The King v. The Inhabitants of Cromford, M.* 47 G. 3. 25

SETTLEMENT---CERTIFICATE.

Where one of two churchwardens was also appointed Overseer of the poor, a certificate of settlement signed by both is a nullity, and does not prevent an apprentice serving the certificated man in the certificated parish from gaining a settlement therein; for the certificate act 8 & 9 W. 3. c. 30. requires the certificate to be under the hands and seals of the churchwardens and overseers, or the major part of them, or of the overseers where there are no churchwardens; and there must be at least two overseers at the time. *The King v. the Inhabitants of St. Margeret, Leicester, E.* 47 G. 3. 332

SETTLEMENT---BY ESTATE.

A sole next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing 40 days in the same parish after the intestate's death, before administration granted to her. And it matters not that the widow of the intestate survived him, if she died afterwards without having taken out letters of admini-

nistration, leaving the other sole next of kin to the intestate. But no settlement is gained by the mere relation back to the death of the intestate of the letters of administration when granted, taken out only 18 days before the next of kin parted with her interest in the leasehold; so as to connect a residence of those 18 days with a residence by such next of kin in the same parish for more than 40 days, after the deaths of the intestate and his widow, before such administration granted. *The King v. The Inhabitants of Horseley, E.* 47 G. 3. 405

SETTLEMENT---EVIDENCE OF.

1. Giving parish relief to a pauper within the parish is no evidence of his settlement there. In the instance in question the relief was administered at one time for a fortnight, and at another time for a longer period, in the parish workhouse. *The King v. The Inhabitants of Chatham, T.* 47 G. 3. 498
2. Hearsay evidence of the declaration of a deceased father as to the place of birth of his bastard child is not admissible to prove the birth settlement of such child. *The King v. The Inhabitants of Erith, T.* 47 G. 3. 539

SETTLEMENT---BY RATING.

A custom-house officer who was rated for his salary towards the land-tax, and in fact paid the rate himself, though the money was either given to him beforehand for the purpose, or allowed to him afterwards by the collector, gains a settlement in the parish in which he is so rated and pays. *The King v. The Inhabitants of Azmouh, E.* 47 G. 3. 383

SET OFF.

The plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause; notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result

sult of the costs, &c. of the cause.
Howell v. Harding, E. 47 G. 3. 362

SHIP.

1. Where the legal title to a ship remained for a month after the sale in the vendors, upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorized to make registry, &c. pursuant to the stat. 34 G. 3. c. 68. s. 15.; yet the vendors are not liable during that interval for repairs ordered by the captain, under the direction of the vendee, (who for this purpose must be considered as a stranger to the legal owners,) and consequently had no authority express or implied to bind them.
Young v. Brander, M. 47 G. 3. 10
2. Though a bill of sale for transferring the property in a ship by way of mortgage may be void as such, for want of reciting the certificate of registry therein, as required by stat. 26 Geo. 3. c. 60. s. 17. yet the mortgagor may be sued upon his personal covenant contained in the same instrument for the repayment of the money lent. *Kerrison v. Cole*, H. 47 G. 3. 231
3. The stat. 34 G. 3. c. 68. s. 15. reciting that by the laws in force, upon any alteration of property in any vessel in the same port to which she belongs, an indorsement on the certificate of registry is required to be made; enacts that such indorsement shall be made in the form therein expressed, and shall be signed by the vendor, &c. and a copy of such indorsement shall be delivered to the registering officer; or otherwise the sale shall be utterly null and void; and such offices is required to make entries thereof on the affidavit on which the original certificate was obtained, and in the book of registry, and to give notice thereof to the commissioners of customs. Then s. 16. provides that if any vessel shall be at sea, or absent from the port to which she belongs, when such alteration in the property shall be made; so that an indorsement on the certificate

cannot be made; (assuming that the certificate is always with the ship;) then it substitutes a bill of sale to be made in lieu of the indorsement on the certificate; requiring the same delivery of a copy, and the same entries and notice thereof, as were required for the indorsement of the certificate by the prior section; but that within ten days after the vessel's return to her port, the indorsement on the certificate, &c. shall be made; as before required. Held that the provisions of the two sections comprehend every transfer of property in a ship; and that a bill of sale executed by a sole owner of a vessel belonging to the port of *Sunderland* to a vendee residing in *London*, at a time when the vessel was in the port of *London*, was void, for want of complying with the requisites of one or other of those sections; neither of them having been complied with: and that it was not sufficient for the vendee to have complied with the requisites of the stat. 7 & 8 W. 3. c. 22. s. 21., which requires a registry de novo upon any transfer of property to another port, and that the former certificate shall be delivered up to be cancelled. *Hayton v. Jackson*, T. 47 G. 3. 511

SLANDER.

1. Where special damage is necessary to sustain an action for slander, it is not sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander.
Vicars v. Wilcocks, M. 47 G. 3. 1
2. In slander the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against him in the Court of Exchequer by the defendant, (but did not proceed to aver any colloquium respecting that answer, with reference to which the words were spoken;) and then alleged that the defendant said of him that he was *forsworn*; innuendo, and the plaintiff had perjured

perjured himself in what he had sworn in his *aforesaid* answer to the bill so filed against him: held that this innuendo could not, without the aid of such a colloquium, enlarge the sense of the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in. *Hawkes v. Hawkey*, E. 47 G. 3. 427

SOUTHWARK.

See COURT OF REQUESTS, No. 1.

SPECIAL DAMAGE.

See EVIDENCE No. 1, or SLANDER, 1.

SPECIAL VERDICT.

See PLEADING, No. 10.

STAMP.

1. A guarantie in writing, for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception of the stamp acts, "a contract for or relating to the sale of goods," and need not be stamped. *Warrington v. Furber*, II. 47 G. 3. 242
2. Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st of *October* 1799 and the 1st of *June* 1800; a memorandum written on the policy on the 11th of *June*, extending the time of sailing to the 1st of *August* 1800, does not require a new stamp; being within the 13th section of the stat. 35 Geo. 3. c. 63. which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the *terms* or *conditions* of any policy, &c. *Kensington v. Inglis*, H. 47 G. 3. 273
3. A policy effected on "ship and outfit," on a voyage upon the Southern Whale Fishery out and home, cannot be altered by consent after the ship sails, and the risk attaches, to an insurance on "ship and goods," without a new stamp; *outfit*, the subject-matter of insurance, being essentially different in such a voyage

from goods; and therefore not within the exception of the stat. 35 Geo. 3. c. 63. s. 13. which enables alterations to be made in the *terms* or *conditions* of a policy, without having a new stamp, so that the thing insured remains the property of the same persons, &c.

It seems, however, that shifting or successive cargoes on board the same ship in the course of the same adventure, (as in the *African* and other trades,) out and home, may be covered by an insurance on goods. *Hill v. Patten*, E. 47 Geo. 3. 373

STATUTE.

See BANKRUPT, No. 4.

An inclosure act having directed that the allotments made by the commissioners should for ever remain for the benefit of the appointees: held that an award and assignment of the *herbage* of a certain close to the surveyors of the highways and *their successors*, for the benefit of the parish of *B.*, though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take; the same as if the terms of the award had been specifically enacted. And the lord of the manor, in whom the fee of the soil remained, is a trustee for the surveyors of the highways for the time being. *Johnson v. Hodyson*, M. 47 G. 3. 38

STATUTES.

Hcn. VII.

4. c. 24. (Remainder-man. Entry.) 552

Edward VI.

2 & 3. c. 13. (Tithes) 178

Elizabeth.

5. c. 9. (Witness. Expences.) 324, 5
 13. c. 5. (Fraudulent Conveyance.) 497
 c. 20. (Benefice.) 235
 18. c. 3. (Bastardy.) 193
 c. 5. (Usury.) 378
 31. c. 3. (Outlawry. Bail.) 527
 43. c. 2. (Overseers of the Poor.) 333
 416
 (Rate.)

(Rate.)	451, 6	39 & 40. c. 89. (Naval stores.)	53
c. 4. (Charitable uses.)	221	c. 104. (London Court of Requests.)	
c. 6. (Costs)	294		239. 336. 347
James I.			
1. c. 15. (Bankrupt. Witness.)	319	41. b. 70. (Insolvent debtors.)	55. 180
3. c. 8. (Writ of Error. Costs.)	240	42. c. 76. (Police magistrates.)	569
Charles II.			
13 & 14. c. 12. (Poor. Overseers.)	416	c. 85. (Misdemeanors abroad).	31
16 & 17. c. 8. (Error. Costs.)	298	c. 119. (Illegal lotteries.)	568
22 & 23. c. 9. (Costs.)	295	43. c. 161. (Horse duty.)	583
29. c. 7. s. 6. (Process on Sunday)	547	44. c. (St. Alban's regulating act.)	41
William and Mary and William.			
3. c. 11. (Settlement.)	385	c. 54. (Volunteers. Arrest.)	105
4 & 5. c. 18. (Bail. Outlawry.)	527	c. 98. (Horse duty.)	580
7 & 8. c. 22. s. 21. (Ship register.)	511	45. c. 13. (Horse duty.)	583
8 & 9. c. 11. (Assigning breaches on bond, &c.)	331	46. c. 108. (Insolvent debtors.)	180.
c. 30. Certificate of settlement.)	332		593
9 & 10. c. 15. (Award.)	466	STOCK-JOBGING.	
c. 41. (Naval stores.)	53	The defendant being indebted to the plaintiff in 486 <i>l.</i> 4 <i>s.</i> 6 <i>d.</i> , for which he was sued; and the plaintiff wishing to invest the amount of the debt in stock on the 19th of <i>November</i> 1803, when the same would have purchased 908 <i>l.</i> 16 <i>s.</i> 7 <i>d.</i> stock; in consideration of forbearing his action and demand till the 19th of <i>November</i> 1804, takes bond from the defendant, conditioned for the transfer by him to the plaintiff on that day of 908 <i>l.</i> 16 <i>s.</i> 7 <i>d.</i> stock, with such interest as the same would have produced, as such stock, in the mean time: held that this was neither usurious, nor within the prohibition of the stock-jobbing act. 7 <i>G.</i> 2. c. 6. <i>Maddock v. Rumball, E.</i> 47 <i>G.</i> 3. 304	
Anne.			
12. st. 2. c. 18. (Salvage.)	57	SUNDAY.	
George I.			
9. c. 22. (Burning stacks.)	173	<i>See PRACTICE, No. 12.</i>	
11. c. 4. (Mandamus to elect.)	270	SUPERSEDEAS.	
12. c. 29. (Affidavit of bail.)	364	<i>See ERROR, WRIT OF, No. 11.</i>	
George II.			
2. c. 36. (Seamen's wages.)	300	SURGEON.	
6. c. 31. (Bastardy.)	193	An action on the case lies against a surgeon for gross ignorance and want of skill in his profession, as well as for negligence and carelessness, to the detriment of a patient: though if the evidence be of negligence only; which was properly left to the jury, and negatived by them; the Court will not grant a new trial, because the jury were directed that	
7. c. 8. (Stock jobbing.)	304		
13. c. 17. Seamen. Impress.)	27		
17. c. 40. (Naval stores.)	53		
20. c. 19. (Labourers. Jurisdiction.)	113		
22. c. 47. (Southwark Court of Requests.)	28		
23. c. 33. (Middlesex Court.)	29		
26. c. 19. Salvage.)	57		
31. c. 11. Servants in Husbandry.)	117		
	123		
George III.			
8. c. (Bridlington inclosure act.)	38		
13. c. 78. (Highway.)	394		
23. c. 58. (Stamp.)	243		
25. c. 51. (Horse duty.)	584		
26. c. 60. (Ship register.)	231. 515. 517. 523		
34. c. 68. (Ship register.)	10. 234. 511		
35. c. 63. (Policy stamp.)	273. 373		
37. c. 73. (Seamen's wages.)	300		
39. c. 69. (West India docks.)	16		

want of skill alone would not sustain the action. *Seare v. Prentice*, E. 47 G. 3. 348

TAXES.

See HORSE DUTY.

TENANT.

See LANDLORD AND TENANT.

TENDER.

A plea of tender *after* the day of payment of a bill of exchange, and *before* action brought, is not good; though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the *whole money* then due, owing, or payable to the plaintiff, in respect of the bill, with interest, from the time of the default, *for the damages* sustained by the plaintiff by reason of the non-performance of the promise. *Hume v. Peploe*, H. 47 G. 3. 168

TITHE.

In an action on the stat. 2 & 3 Ed. 6. c. 13. for the treble value of tithe corn omitted to be set out, it is not enough for the defendant to shew the existence, *in fact*, of a custom in the parish to set out the 11th instead of the 10th mow; for the validity, as well as existence of such a custom is properly triable in this form of action, though penal in its nature; being given to the party grieved, and his only remedy at common law for subtraction of the tithe due to him. *Phillips v. Davies*, H. 47 G. 3. 178

TITLE.

See STATUTE, No. 1.

TRADE.

See COVENANT, No. 1. (With Enemy.)
See INSURANCE, No. 1.

1. Where a licence to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside

amongst the waste papers of his office, and did not know what was become of it; having afterwards searched for, but not recollecting the finding it, and thinking that he had not found it, this is reasonable and probable evidence of the loss of such licence, so as to let in parol evidence of its contents: the paper not being considered as of any further use at the time; and the witness' attention not having been then called particularly to the circumstances. And the witness may speak to the contents of the licence from memory, though he had made an entry of it in his memorandum-book for the private information of himself and the governor; which book was not produced, he having given it to the governor who was gone abroad without returning it to him: for such book, if in court, would not have been evidence *per se*; but could only have been used by the witness to refresh his memory. *Kensington v. Inglis*, H. 47 G. 3. 273

2. Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st of October 1799 and the 1st of June 1800; a memorandum written on the policy on the 11th June, extending the time of sailing to the 1st of August 1800, does not require a new stamp; being within the 13th sect. of the stat. 35 G. 3. c. 63. which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the *terms or conditions* of any policy, &c. *ib.*

3. Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, was licensed by the king's authority; held that an insurance on the *enemy's ship*, as well as on the goods and specie put on board for the benefit of the *British* subjects, was incidentally legalized; and that it was competent for the *British* agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public

public policy, and there being no personal disability in the plaintiff on the record to sue. 273

TRESPASS.

See LANDLORD AND TENANT, No. 3.

1. Trespass lies not against magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction; though the real facts of the case might not have supported such complaint; if such facts were not laid before them at the time by the party complained against, having notice of such complaint, and being properly summoned to attend. *Lowther v. The Earl of Radnor*, M. 47 G. 3. 113
2. Under the 19th section of the general highway act, 13 G. 3. c. 78. a new highway must be set out before an old one can be stopped up; and it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. And if a new highway be not set out before the old one be stopped up, the legality of the orders of the justices for diverting the old road and stopping it up may be questioned in an action of trespass, notwithstanding such orders were confirmed by the Sessions on appeal, stating the fact of a new road being set out in lieu of the old one. *Welch v. Nash*, E. 47 G. 3. 394
3. The defendant cannot justify under the general issue in trespass the cutting the posts and rails of the plaintiff, though erected upon the defendant's own land; there being no question raised as to the property remaining in the plaintiff. *ib.*

TRIAL.

See MANDAMUS, No. 1. or PRACTICE, 1.

TRUST AND TRUSTEES.

See ALIEN ENEMY, No. 1.

1. A., tenant for life, remainder to his son B. in tail, *reversion to himself in fee*, agreed with B. in order to relieve themselves from their debts, to bar the entail: and in 1773 they conveyed estates

in N. and L. to the use of trustees and their heirs, in trust to sell the N. estates and pay the debts, &c.; and as to the L. estate (the only one in question,) in trust that the trustees should, *with the consent of A. and his wife, and of B., or the survivor, sell the inheritance* in fee, and apply the purchase-money on the trusts after mentioned; with a *proviso* that the *rents, issues, and profits*, should, *until sale of the inheritance*, be received by such person and for such uses as they would have been if the deed had not been made and no fines levied. And as to the money arising from the sale of L. estate, in trust to invest the same, with the like consent, in the purchase of other lands in fee, to be settled, subject to certain charges, on A. for life, *remainder to B. in fee*. Held,

1st, That the use of the L. estate, was immediately executed in the trustees even before any consent given to the sale of it by A. &c.; and that, notwithstanding the proviso, which stipulated only for the receipt, by the party before entitled, of the *rents, &c.*, as contradicting from the legal estate of the *inheritance*, which was left in the trustees. And that this was not a mere *power of sale* in the trustees tacked to the legal estate of the owner.

2dly, That though A., who survived his wife and B., continued in possession of the L. estate down to 1795, when he sold it, and died some time after; and though, after the sale of the N. estate in 1774, for the payment of the debts, the trustees of the L. estate never interfered in further execution of the trust during A.'s lifetime, but brought ejectment after his death; yet that no presumption could be made at the trial in favour of the defendants, who purchased from A. in 1795, for a valuable consideration, without notice, either that the trustees had re-conveyed the legal estate to A. in his lifetime, as upon a satisfied trust, according to the old uses; or had conveyed a new estate to him as a purchaser under a sale by them in execution of their trust. For a court of law will never presume a re-conveyance

conveyance by trustees where such reconveyance would be a breach of their trust; which would be the case here upon a supposition that *B.*, the son, was a purchaser for a valuable consideration of the remainder in fee, which was to be limited to him upon the settlement of the new estate to be acquired with the purchase-money of the *L.* estate. Nor is such a presumption to be made in the first instance, even in the case of a doubtful equity, before a court of equity has declared in favour of the equitable title of the party for whom such presumption is required. Nor was there any evidence to support a presumption that *A.* had purchased a new estate of the trustees.

3dly, That *A.*'s possession and receipt of the rents, issues, and profits of the *L.* estate, though for above 20 years after the creation of the trust, without any interference of the trustees, did not shew his possession to be adverse to their title, so as to bar their ejectment against his grantees; such possession and receipt being consistent with and secured to him by the deed of trust. *Keen v. Deardon, H.* 47 G. 3. 248

2. A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of fieri facias at the suit of a judgment creditor. *Scott v. Scholey, T.* 47 G. 3. 467

USURY.

1. The defendant being indebted to the plaintiff in 486*l.* 4*s.* 6*d.* for which he was sued; and the plaintiff wishing to invest the amount of the debt in stock on the 19th of *Nov.* 1803, when the same would have purchased 908*l.* 16*s.* 7*d.* stock; in consideration of forbearing his action and demand till the 19th of *Nov.* 1804, takes bond from the defendant, conditioned for the transfer by him to the plaintiff on that day of 908*l.* 16*s.* 7*d.* stock with such interest as the same would have produced, as such stock, in the mean time: held that this was neither usurious, nor within the prohibition of the stock-jobbing act,

7. *Geo.* 2. c. 8. *Maddock v. Rumball E.* 47 G. 3. 304
2. Money paid by *A.* to *B.*, in order to compromise a *qui tam* action of *money* brought by *B.* against *A.* on the ground of an usurious transaction between the latter and one *E.*, may be recovered back in an action by *A.* for money had and received. For the prohibition and penalties of the stat. 18 *Eliz.* c. 5. attach only on the "informer or plaintiff, or other person suing out process in the penal action, making composition," &c. contrary to the statute; and not upon the party paying the composition; and therefore the latter does not stand, in this respect, in *pari delicto*, nor is *particeps criminis* with such compounding informer or plaintiff. *Williams v. Hedley, E.* 47 G. 3. 378
3. And such recovery may be had, although *E.*'s assignees had before recovered from *B.* the money so received by him, as money received to their use (the money paid by way of composition being at the time stated to be *E.*'s money;) there being no evidence at the trial of this cause to shew that *A.* the present plaintiff was privy to that suit. *ib.*

VENDOR AND VENDEE.

1. Where the legal title to a ship remained for a month after the sale in the vendors, upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorized to make registry, &c. pursuant to the stat. 34 G. 3. c. 68. s. 15.; yet the vendors are not liable during that interval for repairs ordered by the captain under the direction of the vendee, (who for this purpose must be considered as a stranger to the legal owners,) and consequently had no authority express or implied to bind them. *Young v. Brander, M.* 47 G. 3. 10
2. The vendee of goods having accepted a bill of exchange for the price of them, and

and becoming bankrupt before the bill became due, the guarantee who paid the vendor after the bankruptcy of the vendee may recover back the money from the latter, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; and the notorious insolvency of the vendee acceptor being at least a *prima facie* warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill; however, it might still be competent for the vendee to defend himself against this action by the guarantee, by shewing that if a demand for payment had been made upon him by the holder, the bill would have been paid. *Warrington v. Furber, H.* 47 G. 3. 242

VENUE.

In covenant upon a lease, a view being proper to be had, the venue was changed to the county where the premises lay; though most of the plaintiff's witnesses resided in the county where the venue was laid. *Hodinott v. Cox, H.* 47 G. 3. 268

VERDICT.

After verdict in ejectment for a messuage and tenement, the Court will give leave to enter the verdict, according to the Judge's notes, for the messuage only, (pending a rule to arrest the judgment), without obliging the lessor of the plaintiff to release the damages. *Goodtitle v. Otway, E.* 47 G. 3. 357

VILL.

See HUNDRED, No. 1.

VISITOR.

Where the founder of a hospital directed that if, in making up the accounts of the wardens biennially going out of the office, any doubt should arise, which could not be decided by the new wardens, &c. the ordinary should decide it: and also gave to him the appoint-

WARRANT.

ment of a master, upon the default of other persons to appoint, within certain times; and power to correct or remove the master for certain causes, and also power to sequester the profits of the wardens, &c. in case of the improper subtraction of a certain sum directed to be kept in a chest for special purposes, until the money was replaced; and also gave to the ordinary the power of *interpreting the statutes* in case of any doubt: and the founder also delegated to the dean and chapter of *York* power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity: held that none of the powers so delegated constituted a *visitor*, so as to exclude the application of the powers granted by the stat. 43 *Eliz. c. 4.*; and consequently that a commission of charitable uses issued out of the Court of Chancery under that act was valid. *Kirkby Ravensworth Hospital Case, H.* 47 G. 3. 221

VOLUNTEERS.

Volunteer drill serjeants, &c. though subject to the regulations of the mutiny act for trial and punishment by volunteer courts, martial, according to the statute 44 *Geo. 3. c. 54. s. 21.*, are not privileged from arrest for debts under 20*l.* as regular soldiers. *Richman v. Studwick, M.* 47 G. 3. 105

WAGES.

See SEAMEN, No. 2.

WARRANT.

1. The warrant of commissioners of bankrupt for the arrest of a witness, in order to examine him, may issue after his disobedience to the *first* summons. *Bat-tye v. Gresley, E.* 47 G. 3. 319
2. The propriety of granting such warrant, being an act of discretion, must be determined upon by the commissioners acting together at the time. And their order to their officer to make out the warrant must be taken to include their direction as to the persons to whom it is to be directed: but the mere act
of

of signing the names of the commissioners to the warrant may be done by them separately. 319

WARRANTY.

Where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of; it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken. As where the plaintiff declared, that in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, &c. which should be worth 80*l.* and be a *young horse*; and then alleged a breach in both those respects; held sufficient; though the proof were not only of a promise that the second horse should be worth 80*l.* (which it was not) and be a young horse, but also of a warranty that it was *sound* and *had never been in harness*. *Miles v. Sheward*, *M.* 47 *G.* 3. 7

WASTE.

If trees be excepted out of a demise, *waste* cannot be committed by cutting them down; and therefore ejectment cannot be brought as for waste committed in or upon the demised premises. *Goodright v. Vivian*, *H.* 47 *G.* 3. 190

WAY.

See HIGHWAY.

1. One who has a grant of an occupation way may declare in case against the owner of the land over which the way leads for obstructing it, although it be proved that the public in general had used the way without denial for the last 12 years. *Allen v. Ormond*, *M.* 47 *G.* 3. 4
 2. The terminus ad quem, being laid to be a *public highway*, is proved by evidence of a *public footway*, though such
- VOL. VIII.

description of the terminus might have been had on a special demurrer, as not being sufficiently certain. 4

WEST INDIA DOCK COMPANY.

The stat. 39 *Geo.* 3. c. 69. s. 137. gives to the *West India Dock company* certain rates and duties for all goods imported from the *West Indies* which shall be landed, &c. from on board any ship entering into and using the docks; which rates are directed to be "accepted for the use of the docks, and the quays, wharfs, and cranes, and the land-waiters' fees on account of such goods after being unshipped, and all charges and expences of wharfage, landing, housing, and weighing such goods, and of such cooperage as the same may want after being unshipped, and all rent for warehouse room for twelve weeks, and all charges of delivering the same from the said warehouses." The latter words include a delivery of the goods into lighters in the dock, as well as an immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses; although for the purpose of such delivery into lighters it be necessary to put the goods upon trucks, in order to carry them across the quay, and afterwards to crane them into the lighters. But it seems that if the owner require any work to be done upon the goods, ultra the mere transitus of them from the warehouse to the lighter, the Company are entitled to an extra compensation to be settled by convention between the parties, as in other cases out of the act. *Harden v. Smith*, *M.* 47 *G.* 3. 16

WITNESS.

See DEPOSITION, MANDAMUS, No. 1.
or PRACTICE, 1.

1. The party interested in a witness's testimony, who was objected to, on account of his having been convicted of felony, and his imprisonment being unexpired
- L 1

expired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself. *The King v. The Inhabitants of Castell Careinion*, M. 47 G. 3. 77

2. Under the stat. *Jac.* 1. c. 15. s. 10 & 11. it is not necessary, upon summoning a witness before commissioners of bankrupt to be examined touching the bankrupt's effects, to tender him the expences of his journey before-hand; though if he be in fact without the means of taking the journey, it may be an excuse for not obeying the summons: and consequent by a warrant issued by the commissioners on account of the non-attendance of such witness, without lawful impediment, authorizing his

arrest for the purpose of examination is legal. *Battye v. Gresley*, E. 47 G. 3. 319

3. It lies on the party so summoned, having a lawful excuse for not attending, to prove the fact in an action of trespass and false imprisonment, brought by him for such arrest: admitting that an inability to bear the expence of the journey is lawful impediment. *ib.*
4. Such warrant for the arrest of the witness, in order to examine him, may issue after his disobedience to the *first* summons. *ib.*

WRIT OF ERROR.

See ERROR, WRIT OF.

